Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/05652/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 May 2017	**On 31 May 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

HA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss G Capel of Counsel instructed by Sutovic & Hartigan
For the Respondent: Miss J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan with an age assessed as 6 November 1995. He appeals the decision of a First-tier Judge promulgated on 7 March 2017.
2. The appellant had applied for asylum following his arrival by lorry in May 2012. He was interviewed in January 2015 and his application was refused on 19 March 2015. The appellant's claim in brief was that his brother had wanted to marry the daughter of a police deputy who had found out about

the relationship. The appellant's brother had been arrested and then killed. The police had accused the appellant of being a terrorist on finding arms in his property and the appellant was arrested. The police deputy said the appellant would be released if he agreed to marry his daughter. The appellant was released but his mother told him she did not want him to marry the officer's daughter and arrangements were made for the appellant to come to the United Kingdom.

3. In refusing the claim the Secretary of State noted that the appellant had travelled through various countries and he had failed to apply for asylum in Greece and Germany. This damaged his credibility in the light of Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The Secretary of State found the appellant's account to be inconsistent. Taking the claimant's case at its highest the Secretary of State concluded that there was a sufficiency of protection for him in Afghanistan, and moreover the internal relocation option was reasonably available to him. In the light of the findings in **AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC)** the Secretary of State considered that the general security situation did not in itself give rise to a well-founded fear of persecution for a Refugee Convention reason. Returning the appellant to Afghanistan would not be unduly harsh. In relation to Article 8 it was not considered that the appellant came within paragraph 276ADE and there were not very significant obstacles to his integration into Pakistan. There were no exceptional circumstances warranting consideration by the Secretary of State outside the requirements of the Immigration Rules.

4. Consideration was given to the appellant's medical grounds but it was concluded that the country information showed that treatment was available for his condition.

5. The appellant's appeal came before the First-tier Judge on 6 June 2016 when the appellant was represented by Miss Capel as he was before me. There was a psychiatric report from Dr Mehrotra who had found the appellant not to be fit to give evidence, and in the circumstances the judge considered it was perfectly proper not to call the appellant and to draw no adverse inference from his failure to give evidence. Although the appellant had claimed to have been born some months later than the age assessment had found, the judge drew no adverse inferences from this either.

6. Although the judge did not hear oral evidence from the appellant he heard from two of the appellant's key workers as well as having witness statements from two other key workers.

7. In relation to Dr Mehrotra the judge noted that he had not been provided with a record of the appellant's hospitalisations. The judge considered it would be extremely difficult for a consultant psychiatrist to provide a medical report based on two hours with a patient and without access to any of his mental health records. Dr Mehrotra diagnosed the appellant as suffering from paranoid schizophrenia and PTSD. Dr Mehrotra had seen a

medical report from Dr Jauhar who had stated that the appellant had a psychotic mental illness characterised by persecutory delusions, among other matters. The symptoms had been present for two years and had worsened. The appellant had been on continued anti-psychotic medication for two years and he now has "a depot anti-psychotic injection to improve adherence to his treatment".

8. Dr Mehrotra had stated that the appellant had used cannabis regularly since arriving in the UK and he also used psycho-active substances. PTSD was consistent with the account given by the appellant of trauma in Afghanistan where the appellant claimed to have been assaulted in prison.

9. The judge considered the appellant's GP records and the report by Dr Jauhar and concluded in paragraph 125 of his decision that having considered all the evidence he did not find that the PTSD diagnosis was reliable. Nor did he find it supportive of the appellant's claim in general. However, the judge stated in paragraph 126 as follows:

> "From all the psychiatric evidence, I have no doubt that the appellant is suffering from psychotic mental illness. Dr Mehrotra suggests the diagnosis of paranoid schizophrenia. The appellant has presented over several months with auditory hallucinations of third persons, incongruous affect, persecutory delusional beliefs including bizarre content, passivity and poor insight which the doctor states are typical clinical features of this illness."

10. The judge also heard from one of the appellant's key workers who had recalled instances when the appellant was clearly hallucinating and had said that the appellant had self-harmed several times and had suicidal thoughts. He was not able to take his daily medication and needed to be constantly reminded. When he did not take his medication his symptoms worsened and he was now taking his medication monthly through injections. The judge also heard from Mr Dike, a personal advisor for Surrey County Council's Care Leavers Service. The appellant had been hospitalised having been sectioned under the Mental Health Act for 28 days after an altercation with his flatmate in which the appellant wanted to stab him. The appellant was in a bed and breakfast because he had to be removed from his housing (supported accommodation) because of conflict with an Albanian resident. While the appellant had no key worker Mr Dike saw him three times a week. He was looking for a new placement for the appellant.

11. The judge noted in paragraph 138 that the appellant had told a number of doctors and key workers that he had stopped using cannabis and legal highs "but that he has said this on many occasions and does not appear to have broken the habit". In paragraph 140 of the decision the judge stated as follows:

> "The appellant's key workers are unanimous in their opinion that if the appellant were to be returned to live with his mother and sister in Kabul they would not be able to manage him."

12. The judge considered that the appellant's asylum claim was not believable and he would not, if returned to Afghanistan, be of adverse interest to anyone.

13. The judge followed **AK (Afghanistan)** and noted the appellant would be returned to Kabul where he had originally lived with his mother and sister and they still lived there.

14. The judge's decision concludes by dealing with the appellant's human rights claim under Articles 3 and 8. Some treatment for the mentally ill would be available in Kabul, although it was clear from the country evidence that the responsibility for persons who are mentally ill lay primarily with their families. In paragraph 152 of the decision the judge stated:

> "I have carefully considered the interaction of the appellant's mental illness and the country conditions in Kabul as set out in **AK**. If the Appellant would have been living alone on return to Kabul with his mental illness, I might well have found that to return him would be in breach of the Article 15(c) Qualification Directive. However, the appellant has remained in contact with his mother and sister throughout his journey to the UK and after his arrival. They speak regularly by telephone. I find that such a close relationship would mean that he would derive significant support from his mother and sister on return."

The judge referred to **N [2005] UKHL 31** and found that the country evidence showed that there was treatment in Kabul for psychosis and that anti-psychotic drugs were available and that cannabis played a part in the appellant's condition and he observed:

> "Obviously, the appellant will have yet another opportunity to completely give up cannabis on return to Kabul which hopefully will reduce his psychosis."

15. In relation to Article 8 the judge considered the submissions and the delay in determining the appellant's case by the respondent, but it is common ground that the judge did not refer to paragraph 276ADE, although he does refer to Section 117A-D of the Nationality, Immigration and Asylum Act 2002. He concluded that the interference with the appellant's private life was not disproportionate.

16. In granting permission to appeal a First-tier Judge stated as follows:

> "3. The grounds argue that the judge did not give adequate reasons for rejecting the diagnosis of PTSD, failed to take account of relevant evidence including his non-compliance with his anti-psychotic medication regime and the support he received in the UK. The judge had not had regard to the inability of his mother and sister to accommodate him as they cannot accommodate

themselves and paragraph 276ADE had not been properly considered.

4. The appellant's mental health issues and his circumstances on return are clearly the focus of this case. The judge's consideration of the appellant's health issues is set out at paragraphs 98 to 140. The judge gave clear reasons for rejecting PTSD but did accept psychosis and, it would appear the appellant's treatment and needs for that. Consideration of the position on return is at paragraphs 151 to 155. This is, compared to other parts of the decision, superficial and does not appear to take account of the circumstances he would actually face on return.

5. In the circumstances the grounds are arguable and permission is given on all grounds although there is more merit in grounds 2 and 3. Permission granted."

17. A response was filed on behalf of the Secretary of State on 27 April 2017. It was submitted that the judge had conducted a thorough assessment of the appellant's claim and the findings in respect to return to Kabul were detailed and should be read in the light of the rejection of the appellant's asylum claim which had included evidence from the appellant's mother. There was no reason to believe the appellant's claim of poor circumstances in Kabul given the adverse credibility findings and it should be noted that on the appellant's own evidence his mother was able to raise $15,000 for him to come to the UK.

18. Miss Capel submitted that the case was an unusual one. The judge had accepted that the appellant was suffering from a psychotic mental illness. The judge had not properly assessed whether the appellant's claim came within Article 3. The appellant was non-compliant and had to have his medication delivered by injection in a hospital. There was very intensive input into the appellant's care. He was a difficult patient. The appellant had been sectioned under the Mental Health Act. There had been five attendances at A&E and Counsel took me to references to the appellant's periods of detention. He had even absconded from hospital and had joined a youth group. It had been unanimously agreed by the health professionals that the appellant's mother and sister would not be able to manage the appellant.

19. Counsel adopted and agreed with what had been said in the grant of permission that the concluding part of the determination was superficial. There was a question of the accessibility of medication and care given the appellant's record of non-compliance. The judge had not engaged with the evidence. The appellant had to be treated by injection in a hospital.

20. The appellant's mother and sister could not afford to rent their own accommodation and lived with a different family in exchange for providing childcare and doing domestic chores. They did not receive a wage. They would not be able to support the appellant. The judge had erred in failing

to deal with whether the appellant would face very significant obstacles on his return under paragraph 276ADE(1)(vi). The credibility findings were not safe in the light of the medical and other evidence. The appellant lacked capacity and he had been a minor in Germany.

21. Miss Isherwood submitted there had been no material error of law and she went carefully through the decision, noting that the appellant was living in a bed and breakfast with a degree of independence. It was clear he had a certain capacity. The decision was detailed. The appellant had been in contact with his family. There had been discrepancies in the appellant's account. The judge had been entitled to reject the appellant's evidence. The judge had taken into account all the material before him.

22. The claim that the appellant's mother and sister would not be able to manage the appellant had to be read in the context of the negative credibility assessment made by the judge in respect of the appellant. The judge had erred in not referring to paragraph 276ADE, but Miss Isherwood submitted the error was not material.

23. Counsel submitted in reply that the submissions on credibility overlooked the fact that there was no dispute that the appellant was suffering from a psychotic illness. While the judge had rehearsed the evidence, he had not made findings on the appellant's medical needs and the type of care required on return. The appellant was non-compliant.

24. Counsel noted that the hearing had been unusual in that at the conclusion of the first hearing in June 2016 it had been assumed by both sides that the matter had been reserved. Then a request had been made for further evidence from Dr Mehrotra and the second hearing had taken place many months later. There appeared to be nothing in the decision about there being a split hearing.

25. If there was a material error of law the case would need to be reheard de novo and the appellant's representatives had written on 3 May 2017 requesting that a rehearing be adjourned to a later date. Further evidence would be required about the country conditions and a further certificate of capacity in respect of the appellant might be required.

26. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the judge's decision if it was materially flawed in law. It is to be noted that there is nothing in the judge's decision to indicate that the appeal was adjourned part-heard. As far as the parties were concerned, they were under the impression that the matter had been reserved following the hearing on 6 June 2016. The earliest that they would have been aware that the case was not concluded was 3 August 2016 when directions were issued stating that the appeal hearing was part-heard and giving a date of 24 October 2016. The directions stated that the judge had matters of concern with regard to the evidence of Dr Mehrotra and set out some questions for the witness. The hearing listed on 24 October 2016 was adjourned "due to lack of judiciary". There is correspondence between the parties about whether it

was necessary to call Dr Mehrotra. The matter then came before the First-tier Judge again on 2 February 2017, nearly eight months after the decision where the judge had heard oral evidence.

27. As I have said, there is no mention in the determination itself of adjourning the matter or the reasons for it. The parties were unaware that the matter had not been reserved and were awaiting a decision. The only mention of the issue of requesting further material from Dr Mehrotra was in paragraph 106 of the decision where the judge simply says that the consultant's report is dated 30 May 2016 "and there is an addendum report, in response to some questions raised by me, dated 20 October 2016."

28. Where a decision follows a hearing where there has been oral evidence, lengthy delays like this produce problems. In fact, the problem was picked up when the First-tier Judge granted permission. It was observed that the concluding parts of the decision were "superficial" and did not appear to take account of the circumstances the appellant would actually face on return. Another error creeps in to this part of the decision – the judge did not take into account paragraph 276ADE – an error acknowledged by both sides.

29. In circumstances where it is necessary to adjourn a matter part-heard, the reasons for it should have been clearly set out in the decision. The circumstances where it will be appropriate having reserved a decision to reopen the matter will be rare. Questions should be asked of witnesses at the hearing.

30. Although the hearing was on 6 June, it does not appear to be until 6 July that the judge gave manuscript reasons for requiring directions to be issued. These were not, as I have observed, issued until a month later.

31. Of course some of the delays were not the fault of the First-tier Judge.

32. The way in which the appeal was conducted led in my view directly to the problems identified when permission to appeal was granted. It is extremely difficult to pick up the threads after such a long period. The judge failed to relate the problems associated with the appellant's condition – in particular non-compliance and the need for his medication to be dispensed at a hospital – with the reality facing him in Kabul. While medication may be available the problem for this appellant is that he does not take it and his care has to be carefully monitored.

33. Miss Isherwood argued that the appellant was living in semi-independent accommodation in a bed and breakfast. This point overlooks the fact that the appellant is currently on medication administered at a hospital and he has professional help available.

34. I am not satisfied that in all the circumstances this decision can be salvaged. I consider that a lot of the problems with it were caused or contributed by the failure to deal with the matter promptly after the

hearing. This was particularly important given the delays that have occurred. The decision does bear the hallmarks of a two-stage process and I endorse what was said about the latter part of the decision appearing superficial. It is accepted by both sides that the judge erred in failing to take into account paragraph 276ADE(1)(vi). Regrettable though it is, I find no alternative in this case but directing that the decision is materially flawed in law, and given the extent of the fact-finding required, a remittal de novo is necessary. The hearing must be before a different First-tier Judge.

35. The appeal is allowed as indicated.

36. The anonymity order by the First-tier Judge continues.

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 his 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.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 26 May 2017

G Warr, Judge of the Upper Tribunal