Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07393/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 April 2017 & 13th October 2017	**On 7 November 2017**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

[K G]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Lams (instructed by Brent Community Law Centre)
For the Respondent: Mr S Kotas (Senior Home Office Presenting Officer) on 27th April 2017 and Ms J Isherwood (Senior Home Office Presenting Officer) on 13th October 2017

DECISION AND REASONS

1. This an appeal to the Upper Tribunal by the Appellant in relation to a Decision and reasons of Judge Swinnerton promulgated on 29th November 2016 following a hearing in September 2016 at Hatton Cross.

2. The matter first came before me on 27 April 2017 and on that occasion I found as follows:-

(a) "The Appellant in this case is a national of Afghanistan who apparently now has a date of birth of 1985. He has a huge history before the Tribunal of making asylum applications, I think this was his third application, the more recent one prior to that led to a Tribunal Judge dismissing his appeal in 2012, that was Judge Kebede. It has been a feature of his previous Decisions that he has been inconsistent with regard to his claims about what took place in Afghanistan prior to his leaving.

(b) The Judge in the extant appeal, as previous Judges, did not have the benefit of seeing or hearing from the Appellant it being deemed that he had mental health difficulties and was not able to give evidence. The case therefore proceeded before Judge Swinnerton on the basis of submissions and the written evidence; the main evidence was medical evidence.

(c) The Judge had evidence from a Dr Arnold in relation to scars, some of which related to self-harm and some of which were said related to torture, although the age of them was not now possible to ascertain. There was also a Consultant Psychiatrist's report dated July 2012 which was before a previous Tribunal and that report did not assist the Appellant because it said that whilst removal to Afghanistan might be distressing and may increase his suicide risk it was not attributable to any significant mental illness.

(d) However, for the first time Judge Swinnerton had also a report from a Mr Selcuk Berilgen, a Psychological Therapist, and his most recent report was dated September 2016. His report followed some 79 sessions with the Appellant and he was part of the organisation "The Medical Foundation for Victims of Torture". The Appellant had apparently been assessed as a priority case such that he had that level of involvement and Mr Berilgen had done a quite substantial report outlining what his findings were and he had serious concerns about suicide risk.

(e) Judge Swinnerton did not consider that report in any great detail. The entire determination only runs to ten pages. She decided that that report, not being the report of a Consultant Psychiatrist, did not carry great weight and preferred the opinion of the Consultant Psychiatrist. My concerns about that are it is well-known that the Medical Foundation is a highly respected charitable organisation whose opinion should be afforded considerable respect. Mr Berilgen's report was four years more up-to-date than the Consultant Psychiatrist's report and the Judge, I find, did not adequately deal with the content of that report and did not adequately give justification for rejecting its conclusions. For that reason I find the determination cannot stand being tainted by an error of law.

(f) The history of this case is such that there have been previous proceedings and it would therefore be inappropriate to remit it once again to the First-tier Tribunal. I therefore set aside the judgment and it will be re-heard in the Upper Tribunal.

DIRECTIONS

(g) I direct that the Appellant's representatives must file, fourteen days prior to the resumed hearing, a detailed skeleton argument outlining in particular the basis upon which they put their case - specifically whether they are arguing in terms of what the Appellant claims happened to him previously in

Afghanistan or whether they are relying more upon his vulnerabilities due to mental health issues.

(h) I also direct that by the same date, fourteen days prior to the hearing, any up-to-date medical evidence must be filed and served on the Secretary of State.

(i) I also direct the Appellant's representative to file a complete consolidated bundle containing only the evidence upon which they rely and it should not be assumed that any of the former documents will be before the Upper Tribunal. The judge will only refer to that new bundle.

(j) The estimated length of the hearing before the Upper Tribunal is three hours".

3. The matter next came before Upper Tribunal Judge Kopieczek on 17 July 2017. However, the parties not having complied with the directions the matter did not proceed on that day and was adjourned with further directions.

4. Thus the matter came before me on 13 October 2017.

5. Filed on the Appellant's behalf was a bundle of documents of 493 pages, a supplementary bundle of documents running to 39 pages, an Internet document entitled "Right to Remain", a World Health Organisation document concerning the provision of mental health services in Afghanistan dated 2011, a document entitled "No Protection, No Respect Health Workers and Health Facilities Under Attack 2015 and early 2016", the Home Office Country Policy and Information note on Security and the Humanitarian Situation dated August 2017 and the Home Office Country Policy Information note on Fear of Anti-Government Elements dated December 2016. Additionally Mr Lams provided me with a skeleton argument.

6. I had the Respondent's bundle and Ms Isherwood additionally provided a copy of the statement of evidence that the Appellant had relied upon at an earlier appeal and dated May 2011. I was additionally provided with KH (Afghanistan) [2009] EWCA Civ 1354.

7. As when the appeal was before the First-tier Tribunal, I did not hear oral evidence from the Appellant, there being medical evidence that he was not fit to give evidence due to his mental state. The reports indicate he suffers from severe Post-Traumatic Stress Disorder (PTSD).

8. Mr Lam made oral submissions in addition to relying upon his amended skeleton argument.

9. At the outset it was accepted that the Appellant's date of birth is now taken to be 1985.

10. In his skeleton argument it is claimed the Appellant would be at real risk of serious harm on return to Afghanistan from the Taliban such that he is entitled to refugee status.

11. It is also argued that he is at risk as a result of his Hazara ethnicity and further or alternatively at risk because Article 15C of the Qualification Directive is engaged due to the risk of indiscriminate violence in Afghanistan and due to the Appellant's own particular circumstances. It is further argued that removal would be a breach of the Appellant's rights under Articles 3 and 8 of the ECHR on the basis of his diagnosis of PTSD, depression and the associated risk of suicide.

12. The basis of the Appellant's claim as set out in his most recent statement dated 14 September 2015 is as follows

13. He was born in Urozgan province in Afghanistan. He was not educated in Afghanistan. In Afghanistan his father, senior in the Communist Party was murdered by the Taliban. His sister was burned alive. His mother died shortly thereafter, the Appellant says, of grief. He says that he was detained by the Taliban who said that he was Shia but there was no evidence that he had undergone self-flagellation and they would rectify that and give him scars. He was burned on the back with hot rods and beaten and punched causing him to lose his two front teeth.

14. It is fair to say that the remainder of his claim as to dates, chronology and precisely who did what and when has been hopelessly inconsistent throughout the history of this case which is significant. His appeal has been heard twice before in the First-tier Tribunal and once before in the Upper Tribunal. On each occasion he has lost. Upper Tribunal Judge Kebede noted that despite the issues he has with his mental health he has given detailed claims albeit not consistently the same claim.

15. I heard lengthy submissions from both representatives. Mr Lams concentrated most of his submissions on what is clearly the strongest aspect to this claim, namely the risk of suicide and deterioration in his mental health should he be returned. Ms Isherwood stressed the numerous inconsistencies which pointed to his lack of credibility and also and perhaps most importantly the fact that his claim to have been detained and tortured has only been made very recently. It was not a feature in any of his earlier appeal hearings.

16. It is appropriate at this stage to look at the medical evidence.

17. There had been a psychiatric report prepared by Dr R J Bowskill and dated 16 July 2012. He is a Consultant Psychiatrist at Sussex Partnership NHS Foundation Trust and the Priory Hospital Brighton and Hove where he is Medical Director. His report follows an interview with the Appellant over two hours with the use of an interpreter. He also had sight of the Appellant's witness statements of 2011 and 2012, a copy of the substantive asylum interview record and the Upper Tribunal's

determination from February 2012. He also had a copy of a Psychologist's report by Robert Selwood and other documents. His opinion at 6.1.1 of his report states the Appellant reported low mood and some suicidal thoughts. He previously self harmed with superficial lacerations to the back of his forearms which are now healed. He said that there was no evidence of major deliberate self-harm or major suicide attempts. He opined that the Appellant had a moderate depressive episode and would probably benefit from antidepressant medication such as Sertraline.

18. He also noted the Appellant chose not take the medication prescribed by another Dr but was unsure what this was.

19. Dr Bowskill noted that the Appellant misused cannabis but was not able to say whether he was dependent. He noted that the Appellant denied other drug use but that there were inconsistencies about that with other accounts he had previously given.

20. He noted that the Appellant described some flashbacks and nightmares about his sister's death and that if his account was accurate that he witnessed his sister's death then he may be experiencing some symptoms of PTSD. However he noted the Appellant did not become easily distressed when discussing his sister and there was no evidence of hyper arousal that would have been consistent with PTSD.

21. He noted that an Educational Psychologist had assessed the Appellant as having severe to moderate learning difficulties although he was of the opinion that severe learning difficulties would be inconsistent with the account that the Appellant was able to give at interview. He also noted that the speed with which the Appellant answered the questions indicated he had no difficulties with information-processing and the interpreter seemed to easily understand his responses to questions. This he found to be inconsistent with someone suffering from severe learning difficulties.

22. He also noted that the Appellant's appearance, self-care and self hygiene indicated that he was functioning reasonably well on a day-to-day basis. He was staying with friends but despite the lack of stable accommodation seemed to be functioning well.

23. He also noted that the level of depression described by the Appellant would be likely to cause him distress and some degree of impairment in functioning but not to the extent that it would affect day-to-day activities.

24. With regard to suicidal issues the Dr noted that the Appellant reported previous deliberate self-harm by inflicting his forearms. The doctor examined his forearms and found no evidence of recent lacerations and most of the scars were old and healed and had not required suturing. He also noted that the Appellant denied recent overdoses or suicide attempts and there were no psychotic features that would indicate a high risk of suicide. It was his opinion that the Appellant was at low risk of suicide and he also found that as the Appellant did not wish to return to Afghanistan

his risk of suicide may increase if returned but that increased risk would not be directly attributable to any significant mental illness.

25. It was that opinion that weighed heavily on the minds of previous Judges and particularly Judge Swinnerton in November 2016.

26. There is also a Rule 35 report dated 15 March 2013 prepared at a time when the Appellant was in immigration detention. The report's author is Dr Schaif. The Dr describes that the Appellant "claims torture in 2004 by the Taliban and has multiple healed cuts/scars to his back which he claims were sustained secondary to being tortured and beaten up at the time. His also lost his upper front two teeth by being punched at the time by hard object/weapon. Currently he's been experiencing frequent nightmares and suffers from PTSD awaiting counselling". The Dr then expressed his concerns that the Appellant may have been the victim of torture.

27. Since then matters have moved on and in particular there is a lengthy report from Mr Selcuk Berilgen, a Psychological Therapist with Freedom From Torture. There was a letter dated 25 August 2015 and a more recent detailed report dated 2 September 2016. That report followed Mr Berilgen having seen the Appellant on 79 occasions since 11 September 2014. He had had sight of his screening interview, the Letter of Refusal and Upper Tribunal decision from September 2011. He had also seen the reports of Psychologist Robert Sellwood and Psychiatrist Dr Bowskill.

28. In my view Mr Berilgen's report is the most telling report as it is prepared by someone with a very significant knowledge of the Appellant. I also find it significant that the Appellant was referred to the organisation, the Medical Foundation for the care of Victims of Torture by the MAP West Community Mental Health Team. He was referred on 20 January 2014 and his needs carefully considered by the Medical Foundation panel who decided that he met their priority criteria and should be assessed rapidly by one of their clinicians. The report details at length the way in which the relationship between the Appellant and Mr Berilgen progressed. He describes that initially the Appellant was agitated did not make eye contact and appeared not to trust him. However that improved over time. At paragraph 38 Mr Berilgen states that "it is clear that the Appellant genuinely believes that his safety and life would be in danger if he returned to Afghanistan. He is convinced that due to his profile, family history and ethnicity he would be extremely unsafe". The Appellant, he said, is understandably very stressed and overwhelmed about his current situation. He said that he would have serious concerns regarding the Appellant's suicide risk if he were to be removed and what his sense of danger would activate in him. He said that he believes the Appellant requires long-term psychological treatment in which he is engaging currently and continuing support from a few friends that he has here in the UK. It is also his view that the Appellant would require specialist therapy over several years to help him recover sufficiently from the deep trauma he was left with growing up and later in life. Appended to that report is the ICD 10 criteria for diagnosing PTSD.

29. A Psychologist is qualified to diagnose PTSD.

30. There is also a letter from Dr Juliet Cohen of the Medical Foundation dated 13 December 2016. In that letter she points out that the Appellant has a clinical history of significant suicide attempts and self harming behaviour and that even seemingly superficial self-harm injuries are associated with a raised risk of suicide. She also indicates that the organisation is a charity with scarce resources and it can only devote such lengthy therapeutic contact to clients assessed to be both in remit and in priority need. She points out that Mr Berilgen's report follows far more detailed assessment over a far longer period of time than that of Dr Bowskill. She also points out that the Therapist's opinion is not based solely on the history related to him but on his own objective findings based on observation and examination of his mental state. She says all clinicians at Freedom from Torture are mindful of both the requirement to consider the possibility of fabrication and their scarce resources as a charity.

31. I am therefore faced with differing expert views as to the severity of the Appellant's mental illness. I prefer the evidence of Mr Berilgen as supported by Dr Cohen due both to their expertise in dealing with individuals such as this Appellant and also the very sustained period of assessment and counselling that Mr Berilgen went through with the Appellant.

32. I am also aware that since Dr Bowskill reported the Appellant had to be admitted to hospital for sutures after cutting his throat.

33. I find that someone who is suffering from PTSD and depression may very well find themselves unable to give a coherent chronological account over a period of time and indeed may recall other incidents at different times. I therefore do not make an adverse finding on the basis of the Appellant's recent claim to have been detained and tortured. In fact, he claimed that when he was in detention as evidenced by the Rule 35 report. He said it to those detaining him albeit not to his representatives.

34. I therefore reject Miss Isherwood's submissions that his account should be rejected in its entirety because of the very significant inconsistencies. It is of course the case that they are there and indeed are not denied by the Appellant. Furthermore, the Appellant acknowledges that he has made claims under different names and dates of birth in the past.

35. However, what has remained at the core of his claim throughout are the deaths of his father, his sister and his mother shortly thereafter. It is clear from Mr Berilgen's report that the death of his sister by burning was clearly a very significant traumatic event for him.

36. I then turn to the report of Dr Arnold which deals with the Appellant's scars. That report is dated 17 June 2016 and contains the usual diagram of the scars. He says that on the Appellant's back there are at least 17 scars. Some are overlapping making exact enumeration difficult but are

obviously similar. All are of similar width. He describes 12 scars on the Appellant's chest and abdominal wall but unlike those on his back they are narrower and vary in length and are red brown in colour.

37. Dr Arnold describes slightly oblique transverse narrow linear scars on both arms, six on the right and seven on the left and also on the front of his neck six transverse linear scars each some 3 mm x 1 cm to 7 cm and suture marks are visible adjacent to the longer scars. He then describes various other scars and also notes that both upper first incisor teeth are absent.

38. With regard to the scars on the Appellants back Dr Arnold says these are typical of deliberately inflicted burns as described. They have the appearance of fully healed partial thickness burns as would be expected after forceful contact with a hot object such as a heated wire or skewer. He says that the locations are not consistent with accidental injury. He also notes that the number, orientation and distribution of the scars suggest they have not been self-inflicted.

39. As to the age of the scars Dr Arnold notes that it is clear they were present at the time of the Rule 35 report in 2013. He is unable to say how long before that they occurred.

40. He then talks about the scars on the Appellant's chest and abdomen and suggests that these are far more recent; still in the maturing stage of healing and suggest these are likely to be self-inflicted. He also notes the scars to the arms have the appearance of self-harm with a narrow blade and the scar to his neck consistent with self-harm with a sharp object. He also opines that the loss of the teeth is consistent with a blow or blows from a hard instrument to the mouth. In the his final paragraph Dr Arnold says that it would be unusual for a man to show the extent and types of pathology seen in this case if he had not survived severely traumatic experiences and torture. The medical evidence makes it much more likely than not that he has indeed been harmed in the ways he described and severe physical and psychological damage as a result.

41. Miss Isherwood submitted that Dr Arnold had not ruled out self-infliction by proxy. It is right that self infliction by proxy ought to have been considered. However, the history of the Appellant's appeals, detention, counselling treatment and mental ill-health all suggest that that could not have happened in this the case and he would appear to lack the capacity to have organised this. Also it is significant that despite having mentioned the scars as far back as 2013 he has not sought to mention it since. If these had been arranged for the purpose of assisting his asylum claim than he is unlikely to have failed to mention it earlier.

42. Miss Isherwood then submitted that the injuries could have been caused accidentally. I am afraid I find that to be rather fanciful particularly in relation to the burn scars on his back. She then said that they could have been caused when he broke up a knife fight in Sweden which is referred to

in his interview. However, when looking at what he actually said, there is no suggestion by him that he was injured in any way in that incident and again it is fanciful to suggest that the burn marks on his back were caused in that way.

43. I am therefore satisfied, to the lower standard of proof that the Appellant has in fact been tortured. When and by whom and for what reason I cannot say because of the differing and inconsistent reports.

44. Miss Isherwood accepted the Appellant's home area is under the control of the Taliban but submitted that the Appellant could relocate safely to Kabul.

45. I do not accept that he would be at risk for a Convention reason in Kabul. If it was the Taliban who targeted him previously, that was over 10 years ago and it is not credible that he would be a person that they would seek to target today. However, given that his home area is in the control of the Taliban he clearly could not return there.

46. Kabul itself is not in such a state of internal armed conflict as to enable the Appellant to succeed in terms of Humanitarian Protection. Indeed Mr Lam accepted there were difficulties with his protection claim and he relied most heavily upon Articles 3 and 8 of the ECHR in terms of his mental health. There is no doubt that that is the strongest aspect to this claim.

47. In terms of Article 3 In Pretty v UK 2002 35 EHRR 1 it was said that suicide is self evidently a type of serious harm and, if the evidence established that removal would expose a person to a real risk of committing suicide on return, then a decision requiring him to return could give rise to a violation of Article 3. In N (Kenya) [2004] UKIAT 00053 too, the Tribunal acknowledged that there was some authority in Strasbourg jurisprudence for the proposition 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.

48. There is no doubt that there is a high hurdle to cross to succeed under Article 3 in relation to the risk of suicide. On the basis of the very detailed and thorough knowledge of the Appellant by Mr Beringel I accept that returning him to Afghanistan would likely result in a serious suicide attempt. Balanced against that however I have to assess the available facilities which might provide protection for him against suicide upon return. I had been provided with various documents as listed above in relation to the facilities for mental health care in Afghanistan. In particular the World Health Organisation document of 2011 provides figures for the availability of treatment both in and out of hospital and the availability is so low as to represent zero availability. For example mental-health

outpatient facilities represent 0.072 per 100,000 of the population and psychiatric beds represents 0.84 per 100,000 of the population. Beds in mental hospitals represent 0.34 per 100,000 of the population. I appreciate that the information is not very up-to-date but given events in Afghanistan find that the situation has not changed significantly since 2011. The availability of support for the Appellant to prevent his suicide is so negligible as to be non-existent and I therefore find in this case, given his particular vulnerabilities evidenced by his inability to take part in the appeal process, his PTSD, self harming to the extent of cutting his throat requiring stitches and the opinion of Dr Berilgen I am satisfied that this is one of those rare cases where returning him would lead to a real risk that he would commit suicide and that his return would be a breach of Article 3.

49. While I am not satisfied that he would be at risk of persecution for a Convention reason or that he is entitled to humanitarian protection in Kabul I am satisfied that he succeeds under both Article 3 and Article 8 of the ECHR and for those reasons I allow his appeal.

Decision

The appeal is allowed under Article 3 and Article 8 of the ECHR

Signed Date 6th November 2017

Upper Tribunal Judge Martin