Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04037/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 November 2018	**On 11 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

MN (AFGHANISTAN)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs A Mughal, of Montague Solicitors LLP
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant, a citizen of Afghanistan, born on 1 January 1972 against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 11 March 2018 refusing his application for asylum and humanitarian protection.

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Background

2. The basis of the appellant's claim can briefly be summarised as follows. He claimed that he left Afghanistan in 2006, travelling through various countries before entering the UK hidden in a lorry. He came to the attention of the UK authorities when he was arrested on 30 March 2017. He was notified that he was liable to be removed from the UK under immigration powers and he signed a disclaimer stating that he wished to make a voluntary departure as soon as possible. He was detained but subsequently released and on 11 July 2017 he was arrested again at a carwash as a person liable to be detained and removed. On 14 July 2017 he applied for asylum.

3. He said that he was in fear of returning to Afghanistan because of problems with a cousin and he wished to claim asylum. At his screening interview on 29 September 2017 he said that he came from Kabul, was married with four children whose ages were between 7 to 11 years old. He was asked about his health and he said that he had an ache in his leg and suffered from migraines, dizziness and depression. He was not on any medication but his condition affected his memory as he forgot everything. He had come to the UK because his country was not safe: everywhere was covered in landmines and he could not walk freely. There were lots of problems in Afghanistan, including suicide bombers, he feared Daesh, the Taliban and many other groups. He feared being recruited by the Taliban and the government was also telling people that they should fight the Taliban.

4. The respondent's reasons for refusing the application are set out fully in the Reasons for Decision annexed to the decision letter of 11 March 2018. While the respondent accepted that the appellant was from Afghanistan, he did not accept that he would be at any risk from the Taliban or Daesh or that he would be unable to integrate successfully back into Afghan society on his return to Kabul.

The Hearing before the First-tier Tribunal

5. At the hearing before the First-tier Tribunal the appellant relied not only on his statements but also on evidence showing his NHS patient record from the surgery he registered with on 8 June 2017 and a medical report by Dr Hajioff who assessed the appellant on 31 August 2018. At [32] of the decision, the judge said that the medical report had independent probative value as the doctor confirmed that the appellant had scarring on his body typical of or consistent with his account of past mistreatment. The judge has summarised the appellant's account of what he claimed had happened to him in Afghanistan in [16]-[18]: he had been abducted by the Taliban and forced to carry out suicide attacks, had then escaped and in the process got hit in the leg. He had then been picked up by the Taliban in Kabul but had been able to escape from the pickup truck while the vehicle was moving and had then run for ten minutes when he had been shot in the leg. He could not remember any more but had later woken up in hospital. He also recalled being beaten by the Taliban when he tried to escape.

6. He had been taken to a private hospital and after he recovered, he had crossed the border into Pakistan where he had spent three to four years. It was put to him that this was inconsistent with an earlier answer that he had arrived in the UK in 2006 but he replied that he could not remember things correctly. The judge also noted in this context that the appellant had said that he had been beaten in Iran when he had been detained there and commented that the medical report also supported the appellant's account of suffering from memory loss due to traumatic past experiences, which in the doctor's view supported the diagnosis of PTSD.

7. On this issue of PTSD, the judge noted that the patient record showed that the appellant only complained of the signs and symptoms of PTSD relatively recently, despite having first consulted a GP on 30 November 2008. On that occasion and also in 2009, 2012 and 2013 his consultations were about routine matters and it was not until 24 August 2017 that he first complained of suffering from PTSD. The judge noted that on 11 December 2017 the appellant had told the same GP that he was stressed about Afghanistan politics and on 3 January 2018 he told another GP that he had dreams of being pursued by men who wanted to kill him. He also said that a friend who had been with him was shot at the time that he had been shot and later died in hospital, but the judge commented that this account bore no relation to the account the appellant had given to the respondent which made no reference to a friend being shot at the same time. At a further session on 24 January 2018 he gave a further account which corresponded more closely to the account he relied on for his asylum claim but did not feature a friend being shot at and killed or of being abducted and then jumping from a moving vehicle.

8. The judge's conclusions set out in [38] were that the appellant in his dealings with the medical profession had displayed the same pattern of mutation and embellishment that he had displayed in his dealings with the respondent and the Tribunal. The judge said that far from being consistent in his core claim, the appellant had been consistently inconsistent and internally contradictory and that his core claim ran counter to the objective evidence that the Taliban fell from power in 2001 and ceased to have any presence in Kabul for many years thereafter [41].

9. For these reasons the judge found that the appellant had not discharged the burden of proving to the lower standard of proof that his account of past persecution was true. He found that the appellant did not have a profile which would stimulate adverse interest in him on the part of the Taliban and that his claim of ongoing adverse interest ran counter to the country guidance in AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118.

10. The judge went on to consider issues of humanitarian protection, finding that the appellant did not qualify under that head and that returning him to Afghanistan would not be in breach of his human rights. There were no substantial grounds for believing that he would have significant obstacles in reintegrating to life and society in Kabul and that the decision to remove him struck a fair balance between his rights and the wider interests of the country's economic wellbeing and the maintenance of firm and effective immigration controls.

The Grounds of Appeal and Submissions.

11. In the grounds of appeal, it is argued that:

(1) The judge recognised that the appellant was a vulnerable person but failed to accept the policies in place for the way he could give evidence. He had failed to consider the Joint Presidential Guidance about vulnerable adults giving evidence.

(2) He failed to consider the evidence in the light of the medical evidence available to him and failed to give the appellant the benefit of the doubt in an asylum matter.

(3) The appellant had stated his account of PTSD recently as this was the first time it had been ventilated via his legal representatives, to the medical expert and the Tribunal. He had been consistent in his account regarding the Taliban and, having found the appellant to have scars, the judge should have gone on to consider the risk to him in future on return.

(4) The judge failed to consider the appellant's evidence in the round or to apply the requisite standard. The appellant's central core claim had remained consistent.

(5) At [41] the judge had said that the appellant had failed to give the correct dates about when the Taliban fell from power but the judge had had the medical report and in substance had adopted the position of the respondent. This was an easy position to adopt but ensured that proper findings could not be made on the material evidence.

(6) The judge had failed in giving reasons beyond his primary finding that the appellant had not been consistent before the Tribunal. The medical report had been brushed aside and as the appellant was a vulnerable adult, the findings made in the decision must be vitiated.

12. Permission to appeal was granted on the basis that one of the reasons that the judge found the appellant not to be credible was his inconsistent account and it was arguably an error of law not to proceed in accordance with the guidance on vulnerability or at the very least explain why the same did not apply. It was arguable that he should have been treated as a vulnerable witness by reason of his mental health with the hearing conducted and his evidence assessed in accordance with the Joint Presidential Guidance.

13. Mrs Mughal focused her submissions on an argument that the judge had not dealt properly with the medical evidence or applied that to his assessment of the credibility issues. The guidance in the Joint Presidential Guidance should have been followed and the failure to do so tainted the judge's findings. The judge had failed to consider the evidence about the appellant's memory loss when assessing his credibility. Mrs Mughal accepted that the issue of vulnerability had not to her recollection been raised at the hearing. However, the appellant had only recently obtained medical help.

14. Mr Whitwell submitted that according to the Presidential Guidance, the primary responsibility for identifying vulnerability lay with the representatives. No issue had been raised at the hearing. The judge had considered the medical evidence and explained his concerns. He had also fully explained why he did not accept the appellant's account and why he would not be at risk on return to Afghanistan.

Assessment of the Issues

15. The issue I must assess is whether the judge erred in law in such a way that the decision should be set aside. Ground 1 raises the issue of vulnerability and argues that the judge should have followed the Joint Presidential Guidance and had erred by failing to do so. Mr Whitwell is right to point out that in the guidance says that the primary responsibility for identifying vulnerable individuals lies with the party calling them, but representatives may fail to recognise vulnerability. The guidance also makes it clear that before the substantive hearing, in so far as it is possible, potential issues and solutions should be identified at a CMHR or prehearing review and the case papers noted so that the substantive hearing can proceed with minimal exposure to trauma or further trauma for vulnerable witnesses or appellants. If there has not been a prehearing review or the case has been inadequately prepared, such matters should in any event be considered at the commencement of the substantive hearing.

16. No issue was raised in the present appeal at either the prehearing review or the hearing before the judge. However, the judge was clearly aware of the potential significance of the medical report summarising it at [25]-[28], and when evaluating the evidence, the medical report was the first matter that the judge considered [32]-[37]. He was also entitled to take into account as he did, the fact that the patient record showed that the appellant had only complained of the signs of PTSD relatively recently, 24 August 2017 and I note in this context that the appellant only claimed asylum on 14 July 2017 after having been arrested on two occasions.

17. The judge was also entitled to take into account the contradictions in the medical evidence at [35]-[37] in addition to the many contradictions in the appellant's own evidence such as whether he had arrived in the UK in 2006 or he had spent three to four years in Pakistan after leaving Afghanistan and the fact that he had initially said that his cousin was the reason why he fled to the UK but in none of the other Taliban narratives given by the appellant, which in themselves were contradictory, was there any reference to a cousin.

18. I am not satisfied that the judge erred in law by not on his own initiative treating the appellant as a vulnerable witness. In any event, neither in the grounds nor in submissions were any suggestions made as to what adjustments the judge should have made in the conduct of the hearing.

19. Ground 2 argues that the appellant failed to consider the appellant's evidence in the light of the medical evidence. There is no substance in this ground. It is clear that the judge properly considered the medical evidence, taking it into account in the

round when assessing whether the appellant had discharged the onus of showing that he would be at real risk of serious harm on return.

20. Ground 3 raises the point that the appellant had given his account of PTSD recently as this was the first time it had been ventilated via his representatives and the medical expert but it was a question of fact for the judge to decide what inferences could properly be drawn from this issue being raised no earlier than 2017. It is also argued that the appellant had been consistent in his account about the Taliban but this was not the case. The judge identified inconsistencies and it was for him to decide what weight should be attached to them. The ground also refers to scarring but, as the judge commented, the appellant had also asserted at one stage that he had been beaten when detained in Iran [32].

21. Ground 4 argues that the judge failed to consider the appellant's evidence in the round and to apply the requisite standard. The claim that the appellant's account is consistent is repeated. There is no substance in this ground. The judge clearly did consider the evidence in the round and properly directed himself on the standard of proof and there is no reason to believe that did not apply that standard.

22. In ground 5 issue is taken with the judge's comment that the appellant had failed to give correct dates about when the Taliban fell from power and that he had in essence adopted the position of the respondent. There is no substance in this ground. It was for the judge to decide what inferences should be drawn from errors made by the appellant about dates and far from adopting the position of the respondent, it is clear that the judge reviewed the evidence for himself.

23. In ground 6, there is a challenge to the judge's primary finding that the appellant had not been consistent with the Tribunal and it is argued that he brushed aside the medical evidence and failed to take the appellant's vulnerability into account. This ground simply repeats matters covered by the other grounds and, in substance, is an attempt to re-argue issues of fact.

24. In summary, the grounds do not satisfy me that the judge erred in law in any way requiring the decision to be set aside. I am satisfied that, having reviewed the evidence, the judge reached findings and conclusions properly open to him for the reasons he gave.

Decision

25. The First-tier Tribunal did not err in law and its decision stands. The anonymity direction made by the First-tier Tribunal remains in force until further order.

Signed H J E Latter Dated: 3 January 2019

Deputy Upper Tribunal Judge Latter