**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/10252/2017

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 10th January 2019** | **On 29th January 2019** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE GRIMES**

**Between**

**SS**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms G Kiai instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal and cross-appeal, both parties are therefore Appellants in this Tribunal, however I refer to the parties as they were in the First-tier Tribunal.

2. The Appellant, a national of Afghanistan, appealed to the First-tier Tribunal against a decision made by the Secretary of State on 21st September 2017 refusing his application for asylum or humanitarian protection in the UK. First-tier Tribunal Judge Loke dismissed the appeal on asylum grounds but allowed the appeal on human rights grounds under Articles 3 and 8 of the

ECHR in a decision dated 17th October 2018. The Secretary of State appealed against the decision to allow the appeal on human rights grounds and was granted permission to appeal by First-tier Tribunal Judge Doyle on 13th November 2018. The Appellant appealed against the decision to dismiss the appeal on asylum grounds and was granted permission to appeal by First-tier Tribunal Judge Andrew on 27th November 2018.

3. At the hearing I heard submissions from Mr Whitwell in relation to the appeal on human rights grounds, and from Ms Kiai in relation to the appeal on asylum grounds, and I heard responses from both representatives. I reserved my decision which I now give in relation to both appeals.

**Asylum**

4. The Appellant put forward five grounds. The first ground contends that the judge failed to take into account medical evidence of scarring and mental health issues which it is contended are consistent with the Appellant's evidence. It is contended in the second ground that the judge failed to resolve material issues or make relevant findings. It is contended in the third ground that the judge failed to take account of material evidence, in particular the country expert report. The fourth ground contends that the judge failed to take into account material evidence when making core credibility findings, in particular the medical evidence in relation to the Appellant's mental health issues. It is contended in the fifth ground that the judge failed to take into account material evidence when considering humanitarian protection. At the outset of the hearing Ms Kiai contended that there were material errors in relation to the asylum issue but that these did not affect the key findings made at paragraphs 29, 44 and 46 of the decision which, in her submission, should be maintained.

5. I have considered all of the grounds and in my view I am satisfied that the First-tier Tribunal Judge erred in her assessment of credibility in this case. The Appellant's claim, as set out at paragraph 7 of the decision, is that there was a feud between the Appellant's family and that of his uncle, a member of the Taliban and cousins over marriage to his cousin. He claims that, as a result of this feud, his father was killed by his cousins when the Appellant was 11. He claims that the family moved to Doshi and he was subsequently beaten by his cousins and they killed his brother. At paragraph 29 of the decision the judge accepted to the lower standard that the Appellant's immediate family "may have been involved in a feud with his extended family" and that "this feud may have been due to a dispute regarding his brother being promised to his cousin". The judge accepted that the Appellant's family moved to Doshi as a result. At paragraph 30 the judge found that it was not established that the Appellant's cousin had died nor did the judge find it credible that the Appellant's cousin wished to marry him in the aftermath of the events claimed. The judge was further not satisfied at paragraph 33 that the Appellant's uncle and cousins are connected with the Taliban as claimed.

6. Whilst it is clear what the judge did not accept, it is not adequately clear what the judge did in fact accept in relation to the core aspects of the Appellant's claim. The findings at paragraph 29 do not adequately express what was accepted. This is important because it goes to the core of the assessment of risk on return.

7. I cannot accept Ms Kiai's submission that the findings at paragraph 29 can be preserved. On reviewing the decision as a whole, in light of the fact that it is not clear what findings the judge has made, I cannot be satisfied that the risk on return can be adequately assessed in light of these unclear findings of fact. Accordingly, I accept that the second Ground of Appeal put forward on behalf of the Appellant has been made out.

8. I also accept that the first ground has been made out as it is not clear that the judge has taken account of the medical evidence in assessing the Appellant's claim that he was beaten by his cousins.

9. Ground 3, which contends that the judge failed to take into account evidence in relation to the blood feud and evidence as to the relationship between the Taliban and the government, also flows from the lack of clear findings on material facts.

10. In my view the failure to make clear findings as to what was accepted is a material error going to the heart of the Appellant's asylum claim. For this reason I consider it necessary to set aside the decision of the First-tier Tribunal. In light of my doubts as to the precise nature of the findings made at paragraph 29 I cannot preserve any findings of fact in relation to the asylum claim and set the entirety of the decision aside.

11. In light of the Presidential Practice Statements the nature or extent of the judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is appropriate to remit the asylum appeal to the First-tier Tribunal.

**Human Rights**

12. In the Secretary of State's Grounds of Appeal it is contended that the judge made a material misdirection on law in relation to the assessment of Article 3 and Article 8. It is contended that the judge failed to properly apply the guidance of the Court of Appeal in **AM (Zimbabwe) & Anor v Secretary of State for the Home Department [2018] EWCA Civ 64**. It is contended that the Appellant's medical conditions fall far short of meeting the level of exceptionality outlined in the case law and that the Appellant has failed to establish that there would be such a serious and rapid decline in his health and intense suffering should he be returned to Afghanistan. It is further contended that the judge erred in allowing the appeal on Article 8 grounds solely on the basis of his medical conditions contrary to the findings of the Court of Appeal in **GS (India) [2015] EWCA Civ 40**. Reliance is placed on paragraph 111 of that decision which

states that the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise but that factor cannot be treated as by itself giving rise to a breach since that would contravene the no obligation to treat principle.

13. At the hearing Ms Kiai contended that the judge set out the test in **AM (Zimbabwe)** and was aware of that test and took it into account in considering Article 3. She contended that the judge did not allow the Article 8 appeal solely in relation to medical grounds but set out factors at paragraph 46 which went to the proportionality. She contended that any failure in the assessment of Article 3 was not fatal to Article 8 because the judge did consider other factors. In her submission at the very least the Article 8 conclusions could stand.

14. In my view the judge made a material error in relation to the human rights assessment. The judge set out the medical evidence in relation to Article 3 and set out the threshold as clarified in the decision in **AM (Zimbabwe)**. However, in my view the judge gave inadequate reasons for concluding that returning the Appellant is reasonably likely to lead to him suffering difficulties which would breach Article 3.

15. At paragraph 46 the judge considered matters relevant to internal relocation in the context of the decision in **AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC)**. These do not go to the test under Article 3. The judge failed to highlight evidence capable of demonstrating that the Appellant comes within the test in **Paposhvili v Belgium [2017] Imm AR 867** as set out by Lord Justice Sales in **AM (Zimbabwe)** [38]:

> "So far as the ECtHR and the Convention are concerned, the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where "substantial grounds have been shown for believing that [the applicant], although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" (para. [183]). This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the Article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely "rapid" experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state."

16. The judge set out this test at paragraph 45 of the decision but failed to say how the evidence shows that this Appellant is at imminent risk of serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy in Afghanistan due to the non-availability of treatment there which had been available here.

17. In relation to Article 8 the judge stated at paragraph 48 that it was unnecessary for her to consider the stand-alone Article 8 claim. The judge set out factors at paragraph 46 relating to internal relocation. However, the judge did not engage in any Article 8 assessment under the steps set out in **R v SSHD ex parte Razgar [2004] UKHL 27**. The judge did not consider paragraph 276ADE(1)(vi) which had been considered by the Secretary of State in the reasons for refusal letter and was of potential relevance to the determination of the Appellant's private life under the Immigration Rules. I agree with Judge Doyle who said in the permission to appeal that it appears that the judge conflated the test for engagement of Article 3 in medical cases with the factors relating to risk on return and internal relocation. I think that the judge also conflated these issues with the issues around the applicability of paragraph 276ADE(1)(vi). Accordingly, it is not clear what findings have been made relevant to an assessment of proportionality under Article 8. For these reasons I consider that the limited findings in relation to Article 8 which were not part of a stand-alone Article 8 assessment are insufficient and inadequate.

18. For these reasons I consider that the human rights assessment is flawed and I set it aside. In my view the assessment of Article 3 and Article 8 require a fresh assessment. For this reason I remit it to the First-tier Tribunal to be made afresh.

**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.

Signed Date: 21st January 2019

Anne Grimes
Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**
**FEE AWARD**

No fee is payable, therefore is no fee award.

Signed Date: 21st January 2019

Anne Grimes
Deputy Upper Tribunal Judge Grimes