Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10571/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 April 2019	**On 1st May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

MR JMK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Harper instructed by Duncan Lewis solicitors
For the Respondent: Mr Kandola Senior Home Office Presenting Officer

DECISION AND REASONS

1. **Order Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

2. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (S I 2008 front/269) I make an anonymity order. Unless and until a Tribunal or a Court directs otherwise, the Appellant is granted anonymity and no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant in this determination identified as JMK. The order applies both to the Appellant and to the Respondent. Failure to comply with the order could lead to contempt of court proceedings.

3. In a decision promulgated on 16 January 2019, First-tier Tribunal Judge Malcolm dismissed the appellant's appeal against a decision by the respondent refusing his claim for international protection.

4. Permission to appeal was sought on 3 grounds:

   i. The First-tier Tribunal judge had erred in law in her approach to the earlier First-tier tribunal's decision in which adverse credibility findings were made, failing to take into account the new medical evidence from Dr Lohawala of the appellant suffering post-traumatic stress disorder as well as the country report of Dr Foxley to reach her own assessment of credibility of the appellants account of events in Afghanistan, but instead simply considered if the reports would shift the earlier finding, contrary to the approach of Devaseelan, Mibanga and Djjebbar. The judge has failed to provide adequate reasons for maintaining the earlier adverse credibility findings.

   ii. The First-tier Tribunal judge had erred in law in failing to deal with the appellant's mental health difficulties in terms of reasonableness of return or relocation to Kabul as per AS (safety of Kabul) Afghanistan CG [2018] UKUT ooo118 (IAC)

   iii. The First -tier Judge failed to make a rounded assessment as per AS when concluding the appellant would have support of his family because of the quality of the family support available, given the evidence that the appellant's family were in an IDP camp on the outskirts of Kabul and his brother has mental health difficulties, one of his two sisters is married but her husband is only a fruit seller. Further in assessing his ability to integrate the judge has failed to factor into account that the appellant has had no formal schooling or work experience.

5. I find that ground 1 is made out. Whilst the judge acknowledges that the earlier judicial decision is the starting point, in the reasons provided there is no specific self-direction in respect of the guidelines of Devaseelan. This was a case where the new evidence comprised medical evidence of Mental illness including Post-Traumatic Stress Disorder, and an expert report which, amongst other matters, comments on new documentary evidence of the appellant's father having been in the police force. That is all evidence which has clear significance to an assessment of credibility.

6. In brief reasoning the judge at paragraphs 61 to 65 dismisses the new evidence on the basis of the earlier judicial adverse credibility findings without any detailed consideration as to the impact of the new evidence in terms of an assessment of credibility in deciding if the new evidence provides a basis upon which to disturb the original adverse credibility findings.

7. The failure to take a holistic approach does not accurately reflect the application of the guidelines of Devaseelan v SSHD [2003] IMM AR 1

confirmed in the case of Djebbar: LD (Algeria) v SSHD [2004] EWCA Civ 804 at paragraph 30 as follows:

> *"Perhaps the most important feature of the guidance is that the fundamental obligation of every special adjudicator independently to decide each new application on its own individual merits was preserved. The guidance was expressly subject to this overriding principle.*
>
> *"The first adjudicator's determination … is not binding on the second adjudicator; but, on the other hand, the second adjudicator is not hearing an appeal against it … the outcome of the hearing before the second adjudicator may be quite different from what might have been expected from a reading of the first determination only. … The second adjudicator must, however, be careful to recognise that the issue before him is not the issue before the first adjudicator. In particular, time has passed; and the situation at the time of the second adjudicator's determination may be shown to be different from that which was obtained previously. Appellants may want to ask the second adjudicator to consider arguments on issues that were – or could not be – raised before the first adjudicator; or evidence that was not – or could not have been – presented to the first adjudicator."*
>
> *The guidance concluded with similarly unequivocal language. Guideline 8 says in terms:*
>
> *"We do not suggest that, in the foregoing, we have covered every possibility. By covering the major categories into which second appeals fall, we intend to indicate the principles for dealing with such appeals. It will be for the second Adjudicator to decide which of them is or are appropriate in any given case."*
>
> *This is not the language of res judicata nor estoppel. And it is not open to be construed as such. In view of the argument, we must emphasise that in Devaseelan the IAT purported to do no more than provide guidance, and in our* judgment, *properly exercising its responsibilities, that indeed is what it did.*

8. The guidance about how to "*consider arguments on issues that were – or could not be – raised before the first adjudicator; or evidence that was not – or could not have been – presented to the first adjudicator"* is set out at paragraph 39 of Devaseelan onwards as follows:

> "*Subject always to the overriding principles already identified, this reads*:
>
> *"39. In our view the second Adjudicator should treat such matters in the following way.*
>
> *(1) The first Adjudicator's determination should always be the starting-point. It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.*
>
> *(2) Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator. If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.*
>
> *(3) Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator. The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them.*
>
> *40. We now pass to matters that could have been before the first Adjudicator but were not.*
>
> *(4) Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An Appellant who seeks, in a later appeal, to add to the*

available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator.

(5) Evidence of other facts – for example country evidence – may not suffer from the same concerns as to credibility, but should be treated with caution. The reason is different from that in (4). Evidence dating from before the determination of the first Adjudicator might well have been relevant if it had been tendered to him: but it was not, and he made his determination without it. The situation in the Appellant's own country at the time of that determination is very unlikely to be relevant in deciding whether the Appellant's removal at the time of the second Adjudicator's determination would breach his human rights. Those representing the Appellant would be better advised to assemble up-to-date evidence than to rely on material that is (ex hypothesi) now rather dated.

41. The final major category of case is where the Appellant claims that his removal would breach Article 3 for the same reason that he claimed to be a refugee.

(6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated. We draw attention to the phrase 'the same evidence as that available to the Appellant' at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion.

9. For those reasons I find that the approach of the judge failed to follow the Devaseelan guidance and so reveals an error of law. I cannot say with certainty that the new evidence could not have made any difference to the assessment of credibility so that the error is material.

10. The error goes to the root of the assessment of credibility and infects the entirety of the decision. In those circumstances it is not necessary for me to deal with the remainder of the grounds in detail because all matters need to be revisited. I set aside the decision of the First-tier Tribunal to be remade.

11. When a decision of the First-tier Tribunal is set aside, section 12 (2) of the TCE a 2007 requires me to remit the case to the First-tier with directions or remake it myself. In this case the fundamental findings of the First-tier Tribunal judge have been set aside – she has not approached the evidence correctly, and none of the findings can stand. The factual matrix of this appeal is disputed; I conclude that the decision should be remitted to the First-tier Tribunal to determine the appeal de novo by a judge other than Judge Malcolm. The second judge will have to be mindful of the obligation

to take account of all relevant material (Kananarakan 2003 All ER 449) IMM AR 122 271 CA.

Decision:

12. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

13. I set the decision aside and remit the appeal to the First-tier Tribunal, no findings preserved.

14. Anonymity

15. The First-tier Tribunal made an order pursuant to rule 45 (4) (I) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

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

Signed Date 29 April 2019
Deputy Upper Tribunal Judge Davidge