Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00351/2019

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, London	**Decision & Reasons Promulgated**
On 13 January 2020	**On 21 January 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

M I
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

BACKGROUND

The Appellant appeals against the decision of First-tier Tribunal Judge Shanahan promulgated on 24 July 2019 ("the Decision") dismissing his appeal against the Respondent's decision dated 9 January 2019, refusing the Appellant's protection and human rights claims.

The Appellant is a national of Iran. He arrived in the UK on 10 November 2008 as an unaccompanied minor aged sixteen years. His asylum claim was refused but he was granted discretionary leave due to his age. He then made an application for further leave on 23 January 2010 which was again refused. His appeal was dismissed. Permission to appeal was granted but on re-making his appeal was once again dismissed including on protection grounds.

The Appellant made further submissions in January 2013, September 2014 and February 2018. He was convicted on 23 March 2018 of offences involving the supply of Class A and Class B drugs. He was sentenced to 42 months in prison. The Respondent then made a deportation order against the Appellant which led to the decisions to refuse his protection and human rights claims which decisions are under appeal on this occasion. The Respondent has also served a certificate under Section 72 Nationality, Immigration and Asylum Act 2002 ("the Section 72 certificate").

Judge Shanahan began by considering the Section 72 certificate as she was obliged to do. She upheld the certificate for reasons given at [18] to [39] of the Decision. Having done so, she was bound to dismiss the asylum claim. Nonetheless, she went on to consider it. It remained relevant whether the Appellant would be at risk on return because, even if excluded from the Refugee Convention, he could still claim protection against removal under Articles 2 and 3 ECHR if he made out his case as to risk. In that regard, the Judge took as her starting point the previous Tribunal findings as she was obliged to do. Having considered those findings and the further evidence at [30] to [35] of the Decision, the Judge rejected the protection claim.

The Appellant also claims to be in a relationship with [SM] who is a British citizen and is said to suffer from various medical conditions. The Judge accepted that the Appellant was in a relationship with [SM] ([48]). I observe that [SM] did not attend the hearing in support of the Appellant. Although the Judge considered that it would be unduly harsh for [SM] to relocate to Iran with the Appellant for reasons given at [51] of the Decision, she concluded that it would not be unduly harsh for [SM] to remain in the UK without the Appellant ([53] of the Decision).

The Judge therefore dismissed the appeal on all grounds.

The Appellant was represented in his appeal up to the time when permission to appeal was granted by Turpin & Miller LLP. The grounds seeking permission to appeal were drafted by a barrister. Those grounds appear in a skeleton

argument of Mr Jonathan Holt dated 6 August 2019. The grounds are confined to a challenge to the Article 8 findings. The first ground is that the Judge failed to make a finding whether [SM] suffered from the medical conditions claimed. The Second takes issue with the finding at [53] of the Decision that "there is no sufficient medical evidence about her" in the absence of any challenge by the Respondent to the genuineness of those health conditions and where there was a witness statement from [SM] herself. It is also said that the Judge has failed to provide reasons for finding an insufficiency of evidence. The finding at [53] of the Decision is also the basis for the third ground, that the Judge acted unfairly by raising the adequacy of the evidence on this matter of his own volition, in circumstances where the Respondent did not dispute the evidence. There was no challenge to the Judge's dismissal of the protection claim.

Permission to appeal was granted by First-tier Tribunal Judge Swaney on 15 August 2019 in the following terms so far as relevant:

> "... 2. The grounds assert that the Judge erred in failing to make a finding as to whether or not the appellant's partner suffers from specific medical conditions as claimed. The grounds also assert that the judge erred by failing to put a lack of evidence about his partner's conditions to the appellant at the hearing which amounts to unfairness, particularly because the respondent did not dispute the conditions. It is asserted that these errors materially affected the judge's findings in relation to whether the effect of the decision to deport the appellant would be unduly harsh on the appellant's partner.
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> 3. The judge concludes that it would not be unduly harsh for the appellant's partner to remain in the United Kingdom with her parents despite finding that there was insufficient medical evidence and no evidence from her parents. It does not appear from the record of proceedings that this was put to the appellant during the hearing. This is material to the question of whether it would be unduly harsh for the appellant's partner to remain in the United Kingdom without him."

The Respondent filed a Rule 24 response on 6 September 2019 which reads as follows (so far as relevant):

> "... 3. This is an appeal against a deport decision, there has been no challenge against the dismissal of asylum, HP, Article 2 and 3. The grounds focus on the appellant's claimed relationship. It is clear from the refusal letter that the relationship is not accepted. Also, under the consideration of the medical conditions in the refusal letter the focus is on the appellant and not his claimed partner. The grounds are misconceived and the Judge made findings open to be made."

The matter comes before me to assess whether the Decision does disclose an error of law and to re-make the Decision or remit to the First-tier Tribunal for re-hearing.

ADJOURNMENTS

The error of law hearing was originally listed on 7 October 2019. On 26 September 2019, the Tribunal received an e mail from a Ms Sally Powell at HMP

Huntercombe. She indicated that the Appellant wished to seek an adjournment. He did so because he had been informed by Turpin & Miller on 24 September 2019 that they could no longer act for him. There is also a handwritten letter from the Appellant dated 26 September 2019 requesting an adjournment on the basis that Turpin & Miller had told him that they could not act because of "Legal Aid issue".

I granted that adjournment request in the following terms:

> "In light of the circumstances set out in the e mail from Sally Powell (that the Appellant's current legal representatives have stated that they are unable to continue to represent him) the application to adjourn the hearing listed on 7 October 2019 is granted. I accept that there is little time available for the Appellant to seek alternative legal representation. The e mail does not specify the length of adjournment sought and I am not prepared to allow an open-ended extension so I am adjourning for a period of 6 weeks. The hearing will be relisted on the first available date after Monday 11 November 2019."

As it did not appear from the file that the Tribunal had been notified by Turpin & Miller that they had ceased to act, I directed the office to send this decision also to Turpin & Miller seeking that confirmation. By e mail dated 27 September 2019, Mr Tom Giles, a solicitor with Turpin & Miller LLP who had been representing the Appellant confirmed that the firm was no longer able to act for the Appellant. He indicated that the firm had already written to the Tribunal to provide the necessary confirmation. Having checked the file, there is an e mail to that effect from Mr Giles also dated 20 September 2019.

At the hearing before me, the Appellant appeared in person. An interpreter was present to assist him as he had not instructed any other representative and so, according to the Tribunal's records, he was representing himself. I ascertained that the Appellant and the interpreter were able to understand each other.

The Appellant at that point said that he was not ready to proceed. He had expected solicitors/a barrister to be there to represent him. He had been told that they would be. He was unable to name the firm of solicitors, but his solicitor's name was "Tom". He then said it was the same solicitor as previously ie Turpin & Miller LLP. He said he had sent them notice of the hearing on 13 January and he had been told that they would attend. He did not have any letter to that effect. He had tried to speak to "Tom" but was told that he was working at home on the day he phoned. He spoke to a lady on reception who said that the Appellant might not need to attend the hearing.

As a result of that submission, I caused enquiries to be made of Turpin & Miller. The court usher was able to speak directly to Tom Giles. He confirmed that he had previously represented the Appellant but also confirmed that the firm was no longer able to represent him. He confirmed that the Appellant had sent him a copy of the notice of hearing but that he had told the Appellant that he could not assist and would not attend.

The Appellant suggested that I should treat Mr Giles' evidence with circumspection. He went so far as to say that "Tom" was lying. I decline to do so. As a solicitor and an officer of the court, Mr Giles would be well aware that he must not mislead the Tribunal. I am satisfied that he was telling the truth about the information he gave to the Appellant. I am satisfied that he told the Appellant he could not assist further and would not be attending. It may be that the Appellant misunderstood. However, he could produce no evidence that he had been told by Turpin & Miller that they would be representing him at the hearing and no other firm had been instructed.

The Appellant did not formally apply for an adjournment, but I considered whether to proceed on the basis that he was asking for one. Mr Kotas indicated the Respondent's objection to a further adjournment. The Appellant had three months since the previous adjournment to find alternative representation and had not done so. I note also that the notice of hearing on this occasion was sent on 10 December 2019 and the Appellant had not made an application to adjourn. As Mr Kotas also pointed out, the obtaining of continued representation or alternative representation for any further hearing rested on the obtaining of public funding. The lack of such funding was the reason given by the Appellant for Turpin & Miller's discontinuance of representation. As such, it was highly speculative that any different situation would be in place for any later hearing if I had been minded to adjourn. It would not therefore be in the interests of justice to adjourn and it would be disproportionate to adjourn for a second time, particularly since the hearing at this stage concerned whether there was an error of law in the Decision and did not require evidence.

Having considered what was said by Mr Kotas and Mr Giles, I indicated that I intended to proceed and that I was satisfied that it was in the interests of justice to do so. This would have been the second adjournment. There was no evidence that the Appellant had made any attempt to secure alternative representation nor that there was any prospect of him obtaining it if I were to adjourn. The matter could not be allowed to drag on indefinitely. Accordingly, I confirmed that I intended to proceed.

DISCUSSION AND CONCLUSIONS

As the Appellant was in person, I allowed Mr Kotas to make submissions first so that the Appellant was aware of the Respondent's position and could reply to it. The Appellant did not confine himself in reply to the submissions made by Mr Kotas or the grounds as pleaded, but I allowed him to say what he wished to say. In effect, he repeated the substance of his case on all grounds. However, since the grounds and permission grant are confined to the Article 8 claim, I similarly consider only that aspect when determining whether there is an error of law in the Decision. Although the Appellant was in person at the hearing before me, the grounds were pleaded by a barrister on instruction by a firm of experienced immigration practitioners and I am satisfied that, if they considered there were any arguable grounds of challenge to the Judge's findings in relation to the Section 72 certificate or the protection claim more generally, they would have raised them.

I deal first with [SM]'s medical conditions. The Appellant said that she has nine different medical conditions. Her circumstances are set out in her witness statement dated 21 June 2019. As I have already noted, she did not attend the hearing and therefore the Judge's consideration of her evidence was confined to what is said in the statement ([47] of the Decision). As to her medical conditions and reliance on the Appellant, she says this:

> "... 6. At the hospital I was diagnosed with a bipolar disorder, an emotional personality disorder, body dysmorphia, depression and anxiety. I still deal with all this issues to this day.
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> 7. Because of my mental health issues I was only able to finish school and I was never able to work. I am currently on universal credit. I lived with my parents until I meet [MI] and moved in with him.
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> 8. I met [MI] through my sister almost 3 years ago, and we have been together ever since. We developed a relationship very fast and shortly after we met, I moved in with him.
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> 9. I relied on [MI] a lot, as he was able to take care of me. [MI] would make sure that I was taking my medication and he would help me to deal with things when I was struggling. After being together for a while I found out that I was pregnant.
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> 10. [MI]'s arrest was very difficult for me. I was not able to live by myself, so I moved back with my parents. I was also very scared about having to go through the pregnancy and having the baby alone so I decided to have an abortion.
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> 11. Even though [MI] is in prison, our relationship is stronger than ever. We talk to each other every day over the phone and I send a lot of letters to him. Because of my mental health issues I was only able to visit [MI] in prison twice, as it is very hard for me to travel, due to my mental issues.
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> 12. [MI] knows that he made a mistake and he learned his lesson. I know that he will never make a mistake like that again and now he only wants to be able to continue with his life and to be able to build a better future for us.
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> 13. I am already making plans for when [MI] is released. We are planning to move together and we plan to build a family together.
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> 14. I will not be able to cope if [MI] is deported from the UK. It will be better to kill myself than having to live here without him. [MI] is my whole life and I ask you to please let him stay."

The Judge dealt with [SM]'s evidence at [43] to [46] of the Decision as follows:

> "43. I have therefore considered his relationship with [SM]. [SM] is a British citizen, as evidenced by her passport, born on 10th July 1993 and is now therefore 26 years old. She and the Appellant met in 2017, a relationship developed and they moved in together.

> 44. [SM] in her witness statement explains that she has struggled with mental health problems from a young age. She was diagnosed with autism when she was 15 years old. At the age of 20 she became pregnant but did not find out until she was 6 months into the pregnancy. She decided to have the child and then realising that she could not care for him alone she gave him up for adoption. She made this decision because of her mental health issues and although it was very hard for her she believed it was the best option for the child. This led to a bout of depression and an attempt at suicide. She was hospitalised and diagnosed with bipolar disorder, emotional personality disorder, body dysmorphia, depression and anxiety.
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> 45. [SM] explains that she has relied on the Appellant to take care of her. He would make sure she took her medication and he would help her deal with things when she was struggling. His arrest was difficult for her because she was not able to live alone so she moved back in with her parents. She had already discovered that she was pregnant and was fearful of having to go through the pregnancy and have the baby alone. She decided therefore to have an abortion.
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> 46. She states that even though the Appellant is in prison their relationship is stronger than ever. They talk to each other every day by telephone and she sends him lots of letters. She explains that she has only visited him twice because of her mental health and difficulties travelling. She states that he knows he has made a mistake and he has learned his lesson. He will never make a mistake like this again and wants to be with her and build a future together. She states that she will not be able to cope if he is deported and it would be better to kill herself than have a life without him."

Having considered that evidence and the letters sent by [SM] to the Appellant whilst he was detained, the Judge accepted that they are in a relationship ([48]). However, she also noted that, on [SM]'s own evidence, they had seen each other only twice in the period of sixteen months before the hearing. The Appellant was remanded on 23 March 2018 and from that point, the relationship had been conducted at a distance.

The Judge did not dispute the medical evidence. Although she noted at [51] of the Decision that there was "no specific medical evidence" about [SM]'s conditions, nonetheless it was a factor which the Judge there took into account when finding it would be unduly harsh for [SM] to go to Iran with the Appellant.

That was however not the end of the matter. The Judge had to consider not only whether it was unduly harsh for [SM] to go to Iran with the Appellant but whether it would be unduly harsh for her to stay in the UK whilst he returned to his home country. Having properly directed herself in accordance with relevant case-law, the Judge made her findings about this at [53] of the Decision as follows:

> "In this regard I take into account that she lived with her parents before she lived with the Appellant and has now returned to live with them. As I have said there is no sufficient medical evidence about her conditions and there is no sufficient evidence from her parents but given she lived with them before and chose to return to live with them

> when the Appellant was imprisoned I conclude that they are able to care for her and she is safe and secure at home. [SM] will continue to benefit from any medical treatment and involvement with mental health professionals to monitor and manage her conditions as occurred before she entered into the relationship with the Appellant. I also take into account that the contact they have had with each other is almost entirely by telephone and letters which they could continue whether or not the Appellant is deported."

I accept that the Judge does there point to the insufficiency of evidence about [SM]'s medical conditions, care and support. As a matter of fact, the Judge was right to point to the lack of evidence about those issues. The only evidence was from [SM] herself. There was no medical report or other independent evidence. I also repeat the point I made earlier that the Appellant was at this stage of the appeal represented by experienced immigration practitioners who were evidently responsible for the preparation of [SM]'s statement. I have no doubt that if they considered there was further evidence available which could be adduced, they would have presented it. In any event, however, it is clear from what follows at [53] that the Judge proceeded on the basis that everything which [SM] said about her medical conditions and circumstances was true. The finding that it would not be unduly harsh for her to remain in the UK is premised on her having alternative support and medical care which has kept her safe from a young age (she refers in her statement to having mental health problems since she was very young).

The Appellant told me in his reply that [SM] does not have a father and does not have a good relationship with her mother and brother with whom she lives. None of that emerges from her statement which was made barely six months ago. She speaks of parents in the plural and indeed siblings in the plural. She says nothing about any difficulties with her family relationships. It appears from her statement that her family has supported her during difficult times in the past. The Judge could only consider the case put to her on the evidence as presented.

Mr Kotas made two further points about the Article 8 claim. First, he said that, strictly speaking, [SM] did not fall within the definition of "partner" within Appendix FM to the Immigration Rules. I assume that is because she had not cohabited with the Appellant for two years. She says that they had been together for three years when she made her statement in June 2019 which would date the relationship back to June 2016. The Appellant has been in custody since March 2018. Technically, therefore Mr Kotas is right to say that the Judge should not have gone on to consider whether the effect of the Appellant's deportation would be unduly harsh for [SM]. However, any error in that regard is in the Appellant's favour and it is not necessary for me to deal with it.

Mr Kotas also very fairly submitted that there might be an error in the Judge's failure to go on to consider the relationship as part of the Article 8 claim on a wider basis. However, he submitted, and I accept that if the Judge had done so, it could not have made any difference. Nor do I accept in any event that there is any error in that regard. The Judge has dealt with the cumulative effect of

the Article 8 claim at [58] to [74] of the Decision. She there considers the Appellant's private life and his mental health issues when considering whether there are very compelling circumstances outside the two exceptions in Section 117C of the Nationality, Immigration and Asylum Act 2002. It is implicit in what is said at the start of that section (at [58]) that the Judge is there encompassing the finding which she has already made that the impact on [SM] would not be unduly harsh. There was no need for her to go further. The grounds do not challenge that part of the Decision.

CONCLUSION

For the foregoing reasons, I am satisfied that the grounds do not disclose any material error of law in the Decision. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

Notice of Decision

I am satisfied that there is no material error of law in the decision of First-tier Tribunal Judge Shanahan promulgated on 24 July 2019. I therefore uphold that decision with the consequence that the Appellant's appeal remains dismissed.

Signed  Date: 16 January 2020

Upper Tribunal Judge Smith