IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08667/2019 ('V')

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th November 2020	**On 09 December 2020**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'RN'

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the appellant:	Mr A Bandegani, Counsel, instructed by Duncan Lewis Solicitors
For the respondent:	Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

These are the approved record of the decision and reasons which were given orally at the end of the hearing on 19th November 2020.

Both representatives attended the hearing via Skype and I attended the hearing in-person at Field House. The parties did not object to the hearing being via Skype and I was satisfied that the representatives were able to participate in the hearing.

This is an appeal by the appellant against the decision of the First-tier Tribunal (Designated Judge Woodcraft and FtT Judge Chana) (the 'FtT'), promulgated on 4th March 2020, by which they dismissed the appellant's appeal against the respondent's refusal to grant him asylum or humanitarian protection; and to refuse his claims on the basis of his human rights (articles 2, 3 and 8 of the European Convention on Human Rights - 'ECHR'), including a claimed risk of suicide.

In essence, the appellant's claims involved the following issues:

1.1. Whether, as an Afghan national, he was at risk on the basis of his family's loyalties to the former Communist regime which had ended in 1992. His new evidence, including a scarring report and a psychiatric report, needed to be considered in the context of previous adverse credibility findings of a First-tier Tribunal in July 2007;

1.2. Whether the appellant was at risk, such that his removal would breach his rights under Article 15(c) of the Qualification Directive because of the level of violence in Afghanistan and his particular circumstances;

1.3. Whether there would be very significant obstacles to the appellant's integration in Afghanistan, in the context of paragraph 276ADE(1)(vi) of the Immigration Rules;

1.4. Whether, as a result of the appellant's mental health issues and claimed suicide risk, his removal would risk breaching his rights under article 3 ECHR.

In essence, the respondent continued to reject the claims of prior adverse interest, including a claim of torture and abduction of relatives. The respondent did not accept that the psychiatrist, Dr Goldwyn, who assessed PTSD, had provided an adequate assessment. The respondent noted that Dr Goldwyn's assessment was based on the appellant's version of events which had been disbelieved by the previous tribunal. The respondent also noted what she regarded as inconsistencies in the appellant's more recent claim in contrast to his previous claims, specifically including his mother coming to live with them at a shared address in Afghanistan.

The respondent also rejected the assertion that the level of violence in Parwan province was such as to engage Article 15(c); the appellant left Afghanistan as an adult and his claim to be a minor had been rejected in

an age assessment; and the respondent did not accept that there would be very significant obstacles to his integration in Afghanistan.

In respect of the assessed PTSD, it did not amount to a condition which would meet the requirements of Article 3 ECHR, notwithstanding Dr Goldwyn's reference to several suicide attempts. The appellant could have access to medical treatment on his return to Afghanistan.

The FtT's decision

The FTT did not hear live evidence from the appellant because he was not medically fit to give evidence. The appeal was therefore limited to consideration of the appellant's skeleton arguments, brief oral submissions and the documents which were not for the previous tribunal (paragraph [20] of the FtT's decision).

The FtT reminded themselves of the authority of AS (Safety of Kabul) Afghanistan CG [2018] UKUT 001183 (IAC). They also considered the well-known authority of Devaseelan v SSHD [2002] UKIAT 00702. At paragraph [25], the FtT recorded that the appellant had claimed a fear of persecution because of his father's membership of the former communist intelligence services, with the additional allegation, not previously made to the 2007 tribunal, that the appellant had been tortured in Afghanistan and that the authorities had an adverse interest in him. Whilst the appellant claimed before the 2007 tribunal that his father and brother were kidnapped, he now denied making that allegation. At paragraph [25], the FtT recorded as taking as their starting point the findings by the previous tribunal in 2007. The appellant's mental health had not been raised as an issue before the previous tribunal and paragraph [29], the FtT stated that it had to decide whether the medical evidence now provided gave rise to "*powerful reasons*" why they should not follow the previous determination.

The FtT was critical of the medical evidence, in particular the scarring evidence of Dr Goldwyn. At paragraph [33], the FtT noted its concerns that the reference to a "*medically plausible explanation*" amounted to Dr Goldwyn stepping into the shoes of the tribunal. He had based his opinion on what the appellant had told him and had not taken into account the credibility points raised within the 2007 tribunal decision (paragraph [34]). The FtT was critical of Dr Goldwyn's reference to the appellant's depression as a result of immigration detention, in the absence of formal complaints, particularly in relation to claims of having been beaten up by immigration officers (paragraph [36]). The more recent medical report of Dr Buttan did not address issues such as the appellant's claims of ill-treatment in the UK in detention or the inconsistencies in the account given to the tribunal in 2007. At paragraph [39], the FtT noted that the appellant had not received medication for mental health problems and there was also reference in the medical records to the appellant saying he was beaten up by the Taliban in 2011, at a time when he was already in the UK.

At paragraphs [46] and [47] of their decision, the FtT assessed the appellant's claim to have been attacked in Afghanistan, with resulting scars, in contrast to his previous claim where he had said nothing had happened to

him personally. The FtT regarded as implausible that he would not have previously mentioned the allegations he now made that his mother had also been assaulted, with his reticence explained because of family honour and shame, when he had been previously willing to refer to her being targeted by warlords and beaten up within his original asylum witness statement (paragraph [50]). The failure to mention the assault on his mother was not explained by any difficulties in recollection because of mental health issues (paragraph [51]). There was also an inconsistency about whether the appellant father and brother had been kidnapped and detained (paragraph [52]) which was not explained by the appellant's confusion over dates.

Even if the diagnosis of PTSD reflected symptoms which the appellant was genuinely suffering from, the FtT concluded that there could be other possible causes. At paragraph [57], the FtT concluded that there were not "*strong reasons*" why they should depart from the decision of the tribunal in 2007. The unsatisfactory elements in the appellant's evidence could not adequately explained by his PTSD diagnosis.

Referring to the Upper Tribunal decision of AS, the FtT did not accept that the appellant could not return to Afghanistan, and specifically to Kabul. The appellant would have his mother, uncle and cousins' support while living in Afghanistan (paragraph [62]).

At paragraph [68], the FtT concluded that for the reasons set out in relation to asylum and Article 3, there was no substantive difference between the humanitarian protection claim and the other claims and therefore the appeal was dismissed on humanitarian protection grounds.

In relation to the appellant's mental health there was expert medical report of Dr Giustozzi, which once again the FtT was concerned that it relied solely on certain statements rather than examining the appellant and the doctor not engaged with the 2007 tribunal decision. Whilst at paragraph [75], the FtT noted the report as saying that the appellant's return would be a major challenge for him, the FtT noted that the appellant's return would be in the context of the appellant having family in Afghanistan and having lived in Afghanistan until he was an adult. The FtT analysed the risk of suicide from paragraphs [76] to [89] and concluded that there was no evidence to show that the appellant had attempted suicide after he had received an adverse decision of the respondent in August 2019. This, and the fact that the appellant's fear of persecution was not genuine, let alone objectively well-founded, was a heavy mitigating weight against the risk that his removal would be in breach of his rights under Article 3 ECHR (paragraph [88]).

The FtT evaluated the appellant's private life claim in paragraphs [91] to [95], noting that the majority of the time in which the appellant had been in the UK (13 years) was without lawful leave to do so. The FtT concluded that the refusal of the human rights claims did not breach the appellant's human rights.

Having considered the evidence as a whole, the FtT dismissed the appellant's appeal.

The grounds of appeal and grant of permission

The appellant lodged grounds of appeal which are as follows:

1.5. First, at paragraph [29], the FtT had impermissibly applied a test of "powerful reasons" for departing from the 2007 tribunal decision, contrary to the guidance set out in R (MW) v SSHD (Fast track appeal: Devaseelen guidelines) [2019] UKUT 00411 (IAC) which confirmed that the FtT could depart from the earlier decision on a principled and properly reasoned basis.

1.6. Second, the FtT had erred in failing to apply KV (Sri Lanka) v SSHD [2019] UKSC 10, concerning the correct approach to Istanbul Protocol-compliant medical assessments of alleged torture. In particular, at paragraphs [32] and [56], the FtT had erred in requiring Dr Goldwyn to rule out every conceivable explanation for scarring; the FtT had erred at paragraph [33] in concluding that it was impermissible for Dr Goldwyn to have made an assessment of clinical plausibility; the FtT had erred at paragraphs [34] to [35] in concluding that Dr Goldwyn had not taken into account the 2007 tribunal decision, when she made clear in her report, at page [B1] of the appellant's supplementary bundle, that she had taken into account that decision; Dr Goldwyn was not required to provide a running commentary on reasoning of the 2007 tribunal, see JL (medical reports-credibility) China [2013] UKUT 00145 (IAC), which was relevant to the FtT's reasoning at paragraph [38] of the decision. To put matters in context, the new medical evidence post-dated the previous tribunal's 2007 decision by a decade.

1.7. Third, the FtT was obliged, but had failed, to assess the risk of serious harm as per Article 15c of the Qualification Directive, applying the 'sliding scale' approach in accordance with QD and AH (Iraq) v SSHD [2010] EWCA Civ 696. It was not enough to say that there was no substantive difference between the claims under the Refugee Convention, Article 3 ECHR; and Article 15(c) QD.

1.8. Fourth, at paragraph [62], the FtT had applied the UTIAC's guidance on relocation to Kabul which had subsequently been found to contain material errors by the Court of Appeal (see AS (Afghanistan) v SSHD [2019] EWCA Civ 873).

1.9. Fifth, the FtT had failed to consider adequately all of the evidence relating to the appellant's individual circumstances and "country context" when assessing credibility of his account; whether internal relocation was a viable option; and whether there was effective protection in Afghanistan.

1.10. Sixth, the FtT at paragraphs [59] to [62] had failed to explain why it was unwilling to depart from AS (Afghanistan) based on new UNHCR evidence.

1.11. Seventh, the FtT's analysis on article 8 grounds was flawed, without any reference to or application of the mandatory factors in Section 117 of the Nationality, Immigration and Asylum Act 2002, or relevant case law relating to these statutory provisions.

First-tier Tribunal Judge McClure granted permission on 20th May 2020, on all grounds.

The hearing before me

The representatives had provided relevant skeleton arguments and the respondent provided a Rule 24 response, for which I was grateful, as they enabled the hearing to proceed efficiently and without the need for substantial oral submissions.

The appellant's skeleton argument and submissions

The gist of the submissions was as follows. First, in terms of a general approach to expert medical evidence, Mr Bandegani emphasised the weight that should be attached to the views of experts, and if attaching limited or little weight to a report, a Tribunal should provide a cogently reasoned explanation. The purpose of a medico-legal report was to provide an independent assessment capable of corroborating an account of an asylum seeker, in particular relating to the consistency of scars with torture, and an expert assessment of consistency with such allegations should not be one for which an expert could be criticised, see: SA (Somalia) v SSHD [2006] EWCA Civ 1302). Such a report would not take away the role of the judge, as final decision-maker, in making an overall assessment of credibility.

In that context it was perfectly appropriate, in the context of a psychiatric assessment, to make an assessment of clinical plausibility, for example to assess whether the expert believed that the assessed symptoms suggested an attempt was being made to mislead them with an exaggerated or dishonest account. Equally, the Istanbul Protocol in relation to scarring permitted and indeed required an assessment of plausibility and there could be a consideration of the circumstances in which the injury was said to have been sustained.

In relation to each of the grounds, first, there should not have been the "straitjacket" which the FtT had imposed on itself before it could depart from the 2007 decision, of "powerful reasons". Whilst there had been detailed and lengthy reasons given by the FtT, they had, in reality, given themselves little scope for considering the possibility of departure from the previous 2007 decision, when they had new, significant and detailed expert medical evidence, in relation to both scarring and PTSD which had not been before the 2007 tribunal. The misdirection of the need for

"powerful reasons" had been compounded by the FtT's errors in relation to the assessment of that expert evidence.

Noting the authority of KV (Sri Lanka), it had been perfectly appropriate for Dr Goldwyn to have assessed an account as a "medically plausible explanation." Moreover, the FtT had erred when concluding that Dr Goldwyn had reached her conclusion on what she had been told by the appellant without consideration of the previous determination, when in the first page of her report (page [B1] of the supplementary bundle), Dr Goldwyn had referred expressly to the documents read as including the 2007 tribunal decision.

The respondent's Rule 24 response had not engaged with the grounds and the response with regard to the challenges to the assessment of medical evidence; and viability of internal relocation to Kabul, were unclear.

Mr Bandegani reiterated the lack of analysis in relation to humanitarian protection under Article 15(c) and the lack of explanation for why there was no substantive difference between each of the claims of humanitarian protection and Article 3 ECHR.

The FtT had failed to consider, in the context of internal relocation to Kabul, the specific circumstances which would place the appellant at risk. There was a similar failure to consider his personal circumstances in relation to the appellant's Article 8 claim.

The respondent's submissions

Mr Walker relied on the Rule 24 response dated 15th October 2020. Without criticism of him, Mr Walker's submissions beyond the response were limited. The FtT's reference to the UTIAC decision in AS (Safety of Kabul) was immaterial, as it bore no difference on the question of internal relocation. The FtT had been entitled to consider Dr Goldwyn's report but ultimately conclude that the account given by the appellant was not truthful. The FtT had given anxious scrutiny to the appellant's evidence, noting that the claim was essentially the same as in 2007. The FtT's assessment of the severity of the appellant's psychiatric illness was adequately reasoned, as to why the appellant's illness did not meet the severity of Article 3 ECHR.

While Mr Walker made no formal concession, he accepted that the FtT's reference to "*powerful*" and "*strong*" reasons did have a bearing on the FtT's reasoning and that it had perhaps been too much of a "*cage*" or a "*barrier*" to consideration of the new evidence.

Discussion and conclusions

In relation to the first ground, on the one hand, I am conscious that, particularly in a detailed decision, it is appropriate to consider the FtT's reasoning as a whole and not to consider phrases in isolation, when the FtT will necessarily have assessed the evidence at first hand. The FtT's decision was detailed, thorough, and clearly structured.

On the other hand, I accept the submission that the FtT misdirected itself twice in its decision, in similar terms (and so it cannot have been a typographical error, nor is it an isolated phrase,) when the FtT stated:

"We have to determine whether the medical evidence now provided, gives rise to powerful reasons why we should not follow the previous determination and that the medical evidence provides a satisfactory explanation for the inconsistencies in the appellant's evidence."

This is the backdrop to, and precedes the analysis of the medical evidence, which is at the core of the appellant's renewed application, from paragraphs [31] to [40]. The threshold of "*powerful reasons*" is reiterated in similar terms at the conclusion of the FtT's section on credibility, at paragraph [57]:

"We therefore find after considering the medical evidence will all the evidence in the round, that there are no strong reasons [my emphasis] why we should depart from the decision of the First-tier Tribunal Judge Turquet."

The imposition of such a threshold applied to the medical evidence and the appellant's credibility. I accept Mr Bandegani's submission that the new medical evidence on scarring and PTSD was core to the appellant's renewed claim, as neither issue was before the 2007 tribunal, ten years' earlier. To apply a test of 'powerful' or strong reasons as a threshold was not only impermissible (as it imposed the very straightjacket warned against in the decision of R (MW) v SSHD (Fast track appeal: Devaseelen guidelines) [2019] UKUT 00411 (IAC), but a material error, as it related to the core of the new evidence.

In relation to the second ground, I accept that the FtT erred in failing to apply the authority of KV (Sri Lanka) v SSHD [2019] UKSC, which noted at paragraph [20], that decision-makers can legitimately receive assistance, often valuable, from medical experts who feel able, within their expertise, to offer an opinion about the consistency of their findings with the asylum-seeker's account of the circumstances in which the scarring was sustained. The FtT erred in effectively discounting or placing less weight on Dr Goldwyn's assessment of the account of ill-treatment as a medically plausible explanation for the PTSD, depression and scarring, on the basis that it was not her function to do so.

It is also clear that the FtT's reference at paragraph [34] to Dr Goldwyn basing her opinion on what the appellant has told her, is not accurate. That reference states:

"There is no record that [she] has considered the previous First-tier Tribunal Judge who dismissed appellant's appeal for lack of credibility"

I accept that on the first page of Dr Goldwyn's report, there is indeed a record of the documents considered, which includes the 2007 tribunal decision. The FtT cited, at paragraph [34], the authority of SS (Sri Lanka) v SSHD [2012] EWCA Civ 155, where an expert had not been provided with the

previous adverse determination. That was clearly not the case here, and the FtT erred in directing themselves to that authority.

The FtT also referred to what it regarded as Dr Goldwyn's failure, at paragraph [34]:

"*by not referring to the credibility points within the appeal determination, the medical report has made opinions of the account of the appellant without giving due consideration to the required documentation.*"

The FtT did refer itself to the authority of JL (medical reports-credibility) China [2013] UKUT 00145 (IAC) (at paragraph [38]), but I also accept the appellant's challenge that the FtT erred in failing to apply the guidance in that case, that a medical expert should not conduct a running commentary on the reasoning of the judge who has made such findings, but should concentrate on describing and evaluating the medical evidence (headnote (1)).

In relation to the second ground, I conclude that the FtT's analysis of the expert medical evidence was fundamentally flawed. As the appellant's credibility was absolutely critical to this decision, notwithstanding other evidence identified by the FtT as weakening the appellant's credibility and plausibility, this alone rendered the FtT's decision unsafe.

In relation the third ground, I also accepted Mr Bandegani's submission that the FtT erred in disposing of the appeal under Article 15(c) QD and Articles 2 and 3 ECHR by conflating all three claims, when at paragraph [68], when it stated

"There is no substantive difference between the Appellant's claim under the Refugee Convention, the Human Rights Convention (Articles 2 and 3) and under paragraph 339C..."

In doing so, the FtT had failed to carry out and individualised assessment, in the context of the 'sliding scale' of risk, separate from the specific claim of feared persecution. The conflation followed from the FtT's assessment of the appellant's credibility, which for reasons already explained, was flawed. In other words, having concluded that the appellant was not truthful, I accept the criticism that the FtT then failed to assess in detail the circumstances on the appellant's return to Kabul in terms of any risks posed, noting only briefly (at paragraph [62]) that the appellant would have family support on his return.

In terms of fourth to the six grounds I explored with Mr Bandegani the extent to which the FtT's reference to AS (Safety of Kabul) Afghanistan CG [2018] UKUT 001183 (IAC) disclosed a material error of law. He submitted (and I accept) that the remaining grounds, in reality, focus on the lack of assessment of the appellant's individual circumstances, in the context of the general country situation and his individual circumstances. I do not go so far as to say that the FtT's reference to the Upper Tribunal's decision in AS alone was a material error, but instead I accept the general challenge

that here was a failure to consider the appellant's individual circumstances on his return to Afghanistan, in the context of the country evidence.

Finally, in relation to the seventh ground, the FtT's analysis at paragraphs [12] to [13] in relation to private life was, in contrast to the remainder of the decision, extremely brief. While the FtT is not required to set out the full provisions of section 117 of the Nationality, Immigration and Asylum Act 2002, the FtT's analysis of private life was, in reality, limited to a statement of the precarious nature of the appellant's presence in the UK; the fact of his growing up in Afghanistan and the ability to return to 'Pakistan' [sic] (at paragraph [12], which must be mis-numbered as it follows paragraph [94]). The conclusion was limited to a reference to "exceptional circumstances." I accept the criticism that the FtT's analysis of proportionality was simply not sufficient, or at least sufficiently explained.

In conclusion, in what was otherwise a very detailed and well-structured decision, the FtT's decision did include material errors, for the reasons set out above. Bearing in mind the errors related, to a large extent, to the findings on credibility, I do not preserve any of the findings of fact.

Decision on error of law

In my view there are material errors here and I must set the First-tier Tribunal's decision aside.

Disposal

With reference to paragraph 7.2 of the Practice Direction and the extent of the fact-finding, this is clearly a case that has to be remitted to the First-tier Tribunal for a complete rehearing.

The remittal shall involve a complete rehearing of the appeal. All aspects of the claims must be addressed, without preservation of findings.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I remit this appeal to the First-tier Tribunal for a complete rehearing.

Directions to the First-tier Tribunal

This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact.

The remitted appeal shall not be heard by Designated Judge Woodcraft or First-tier Tribunal Judge Chana.

The anonymity directions continue to apply.

Signed J Keith Date: 2nd December 2020

Upper Tribunal Judge Keith