Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09246/2018

THE IMMIGRATION ACTS

Heard at Field House via Teams	**Decision & Reasons Promulgated**
On 15th June 2021	**On 10th August 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR T N
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Bundock, instructed by Duncan Lewis & Co Solicitors (Sackville House London)
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellant appeals against the decision of First-tier Tribunal Judge Housego dated 2nd December 2020 which refused the appellant's appeal against the decision by the respondent (dated 14th September 2017) to refuse his human rights claim and deport him to Afghanistan, on the grounds that he has erred in fact and law and failed to take account of material subjective and objective evidence.

It is not known when the appellant entered the United Kingdom but he claimed asylum in April 2008. On 30th October 2008 the appellant's asylum claim was refused. He was granted discretionary leave from 15th November 2011 to 14 November 2014. In July 2014 he was convicted of motoring offences and sentenced to 18 weeks imprisonment. On 29th April 2016 he was convicted of robbery and on 27th May 2016 sentenced to a term of 5 years imprisonment. He challenged his deportation on the basis of his Article 8 family life with his wife and child. A fresh decision was made refusing the appellant's human rights claim.

On 3rd July 2018, First-tier Tribunal Judge Hodgkinson refused his claim on protection and human rights grounds, recording that the Secretary of State did not object to protection matters being raised. That decision, however, was set aside by Upper Tribunal Judge C Lane on 30th November 2018. On 25th July 2019 Duncan Lewis submitted amended grounds of appeal to include protection grounds. The substantive hearing was converted to a Case Management Review on 15th November 2019. At a further hearing, before First-tier Tribunal Kimnell on 5th December 2019 who recorded that the appeal was on protection and human rights grounds, it was decided that the appellant had never, as asserted, been granted refugee status. The pandemic followed and the appeal was not heard until 17th November 2020.

In particular, the grounds of challenge to First-tier Tribunal Judge Housego's decision were that the judge

(i) failed to give adequate reasons and failed to consider witness evidence in finding that the appellant lacked credibility.

(ii) failed fully to consider subjective and objective evidence, erroneously finding that the appellant was not receiving medical treatment and that his return would not breach his human rights and further, the judge's findings were irrational.

(iii) erred in law in his application of **AM (Zimbabwe) [2020] UKSC 17** when considering medical evidence and the risk of suicide.

(iv) failed to take into account the evidence of the appellant's probation officer in finding that the appellant was not rehabilitated.

(v) made errors of fact and law in considering whether the appellant faced a risk on return. In particular, the First-tier Tribunal at paragraph 62 stated that whilst Afghanistan was not a "good or safe place to live", that did not mean that a breach of Article 3 arose, given the appellant was a "foreign criminal with a serious offending past". That was wrong in law and his offending history was of no relevance within Article 3.

(vi) the First-tier Tribunal made an error of law when considering whether there were very compelling circumstances. As set out in **NA (Pakistan) [2016] EWCA Civ 662**, Section 117C did not require that an offender met all the elements of Exception 1 or 2 to demonstrate very compelling circumstances.

> *"It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in Section 117C(6). (paragraph 37 of **NA**)."*

At the hearing before me Mr Bundock relied on a lengthy skeleton argument setting out in detail his criticism of the decision and expanding on the grounds of appeal. He requested that the notes of the hearing compiled by Miss Walker might be submitted and Miss Walker, during the currency of the hearing, provided a witness statement together with her notes. I considered this to be a last minute provision of the witness statement but, bearing in mind the elements cited in her grounds of appeal drafted by her appeared to coincide with the Record of Proceedings which are located in the third file, those documents were admitted and without demur from Mr Melvin.

Mr Bundock contested that the judge's conclusion that the appellant was not a reliable witness was not adequately reasoned, albeit I pointed out that the appellant was convicted of an offence of dishonesty in 2016. Mr Bundock criticised the judge's use of the variety of accounts that the appellant had given on his journey when making adverse credibility findings. Mr Bundock submitted that the appellant had fled Afghanistan as a child and had been sexually assaulted and was interviewed without a lawyer present and the judge failed to consider this when addressing the appellant's credibility. Nor had the judge taken into account that the appellant had a diagnosis of complex PTSD and his probation officer stated that he had behaved extremely well throughout his time in incarceration. Further, the judge appeared to misunderstand that the appellant's asylum claim had been concluded in previous appeals and that his asylum *appeal* was unsuccessful, albeit that previous appeals had been determined in his favour and the substance of his asylum claim had never been determined by the Tribunal. I did point out that the Secretary of State had refused the appellant's asylum claim and there had been no successful challenge and the appeal was on the basis of humanitarian protection and human rights.

In relation to grounds 2, 3 and 5 Mr Bundock submitted that the judge failed to take into account and give adequate treatment to the expert assessment of Dr Byrne, Clinical Psychologist, dated 8th November 2019 and merely dismissed it out of hand as being out of date when the report was extensive and compelling and identified that the appellant's presentation was too complex to receive treatment through a primary care service. Indeed, Dr Byrne recorded that the appellant was receiving treatment and his medical records from the community showed that following a release he had been medicated with quetiapine, an antipsychotic. This was relevant evidence which was not taken into account. Nor did the judge take into account the Oxleas NHS Foundation Trust letter or that the appellant had previously attempted suicide, which was documented in the report of Dr Byrne. That report detailed the intensity and consistency of the appellant's mental illness and presentation and similarly his suicidal and

self-harming behaviour. The evidence of the appellant's wife, Ms Ali, was also not given adequate consideration.

The approach in relation to Article 3 was a misdirection because the appellant's offending behaviour was clearly taken into account in considering a breach of Article 3. Further, the judge further considered that a suicide case could not meet the **(Paposhvili v Belgium, 13 December 2016, ECtHR (Application No 41738/10)** test and thus misdirected himself in relation to the Article 3 test at paragraph 68. **Paposhvili** extended to cases of mental illness and this was the Secretary of State's own position in her public policy. The test was clear that there was a real risk of either serious, rapid and irreversible decline in mental health resulting in intense suffering or a significant reduction in life expectancy. The judge apparently excluded suicide risk because it was not a situation where absence of treatment would inevitably cause a reduction in lifespan but this was wrong in law. Alternatively, even if the judge was right about **Paposhvili**, there was still a requirement to analyse the appellant's case in the light of the domestic authorities of **J v SSHD [2005] EWCA Civ 629** and **Y & Z v SSHD [2009] EWCA Civ 362** but he failed to do so, and he failed to consider the extent to which the appellant's psychiatric vulnerability and risk of suicide would arise from his mistreatment in Afghanistan. The judge also erred in his approach regarding the access to treatment.

There were errors of law in relation to the evidence regarding the treatment of risk in Afghanistan. When considering this risk, the judge failed to take relevant considerations into account with regard to medication and failed to address the issue of the counterfeit medication in Afghanistan as evidenced in the report of Dr Giustozzi. Secondly, the judge failed to consider or gave limited weight to Dr Giustozzi's report because it was eighteen months old at the time of the hearing and had predated **AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC).** The judge did not consider the extent to which Dr Giustozzi's evidence was consistent or inconsistent with the evidence heard and accepted by the Tribunal in **AS [2020]**, bearing in mind that the Tribunal found there had been no material change in circumstances in relation to mental health care since **AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC)** and the reason given was not a rational reason therefore to reduce the weight given to Dr Giustozzi's report.

Further, there were contradictory findings in relation to the evidence given in relation to the wife. At [80], the judge reasoned that the appellant could be reminded to take medication from the UK but at paragraph 67 found that his wife would not be able to support him because the relationship may not endure and thus these findings were irreconcilable. Finally, when considering that the appellant could access his family it failed to take into account relevant considerations that the appellant had left Afghanistan fifteen years ago and his relatives had lived in a country and a region ravaged by indiscriminate violence.

In relation to Article 8, the errors listed above were also relevant to the assessment under Article 8. There was an error in the approach to Section 117C of the Nationality, Immigration and Asylum Act 2002. It was clear that

the judge considered circumstances in Afghanistan particularly relating to the appellant's mental health and consequences of it to fall outwith the Article 8 assessment, stating that they properly fell to be considered under Article 3. That was an error of law.

The judge also adopted a relativised approach to Section 117C(5) and the test of undue harshness when referring to the appellant's serious offences. That approach was conclusively rejected by the Supreme Court in **KO (Nigeria) v SSHD [2018] UKSC 53** at paragraph 32.

Mr Bundock then advanced that the judge had failed to make any adequate assessment of the best interests of the young son. I stopped Mr Bundock at this stage and pointed out that these were not part of Miss Walker's grounds and could not be advanced at this stage in the proceedings.

By way of response, Mr Melvin relied on his response to the Tribunal under Rule 24 dated 7th January 2021. He argued that the judge was entitled to make a finding on the appellant's credibility at ground 1 and failed to see the materiality of that ground as the appeal was not based on an asylum claim but based on human rights which involved a deportation issue and Article 3. In relation to ground 2, that the argument that the judge failed to properly assess the medical evidence and medical treatment, it was submitted that the judge had adequately assessed the expert evidence and the current treatment. In relation to ground 3, the judge had fully considered **AM (Zimbabwe)**. In relation to ground 4, the judge had found the appellant to be a serious criminal and upheld the Section 72 certificate that the appellant was a danger to the public and it was unclear how a probation officer's opinion could detract from the finding that the appellant was a serious violent criminal who had been sentenced to a period of five years' imprisonment. The judge could not be expected to comment on every piece of evidence before him and the starting point was that he had been sentenced to four years' imprisonment and was expected to be deported unless there were very compelling circumstances over and above those set out in the exceptions. In relation to ground 5, the judge had made a finding that the appellant would have family support on return and given his reasons for doing so and in ground 6, the judge had made findings on very compelling circumstances. Overall, it was submitted that the grounds were no more than an attempt to re-argue the appeal and revealed no material errors in law.

I stated at the hearing that I found that there was indeed an error of law. As I pointed out at the hearing, the appellant was convicted of an offence of dishonesty and sentenced to five years' imprisonment for robbery and found that the judge had given adequate reasons for considering that the appellant was not "a reliable witness". That said, I found that the judge failed to address the medical report of Dr Byrne, which was a detailed report, and appeared to consider that the appellant was not currently in receipt of any therapy or treatment, which appears to be incorrect. The evidence of the Oxleas NHS Foundation Trust was evidence of ongoing engagement with the mental health authorities and further, Dr Byrne's report provided a detailed summary of the appellant's community medical records following his release from detention up

to October 2019 and assessed that appellant's presentation was too complex to receive treatment through a primary care service and that he was on medication to treat psychosis, depression and the physical consequences of anxiety. To dismiss this report merely because it was dated 8th November 2019 when the hearing took place in November 2020 with a one line dismissal was plainly inadequate. This report is axiomatic and deserves more detailed engagement, bearing in mind the supporting report of Dr Ibrahimi and the Oxleas letter. The judge also appeared to omit consideration of the mental health of the appellant from his Article 8 assessment, merely stating that that needed to be confined to Article 3. That too was an error of law.

I also find that there was a fundamental legal misdirection in relation to Section 117C, not least that all the factors relating to the "very compelling circumstances" needed to be taken into account.

The judge further made reference at paragraph 34 that he had paid particular attention to the expert report of Dr Antonio Giustozzi concerning Afghanistan and to the psychiatric reports of Dr Fatema Sheba Ibrahimi and the psychological report of Dr Majella Byrne but the judge failed actually to engage with the reports of Dr Byrne or Dr Giustozzi. The judge failed to engage with the report of Dr Giustozzi because he considered that it predated **AS [2020]** but did not realise that many of the findings in relation to mental health were sustained by the Tribunal from the previous country guidance of **AS [2018]**. Once again, the judge failed make adequate findings in relation to the report of Dr Giustozzi and failed to take into account the relevant evidence.

Not least, the judge appeared to take into account that the appellant had a criminal record when considering Article 3. He stated at paragraph 62:

> *"Afghanistan is not a good or safe place to live when compared to the UK. That does not mean that it is a breach of Article 3 for a citizen of that country to be required to return there from a 3rd country where he is a foreign criminal with a serious offending past and no right to be in that 3rd country."*

This is not a mere slip because at paragraph 69 the judge repeats the error: "This is an Article 3 claim not an asylum claim. If there are very significant obstacles to the return of the appellant to be returned to Afghanistan the appeal does not succeed as more is required for this appellant to succeed, given his five year sentence."

Criminality has no bearing in relation to the Article 3 assessment. It is asylum and humanitarian protection that may be excluded on that basis.

The judge also appeared to exclude the risk of suicide from the ambit of **AM (Zimbabwe)**, also an error of law, when stating at paragraph 66 in relation to the cost of medication: "This is not a reason to allow an Article 3 medical claim." The judge appeared to consider that cost barriers to treatment could not lead to a successful Article 3 claim, which departs from the legal test. It was noted in Counsel's skeleton argument that this argument departed from the grounds as articulated but submitted that it fell well within Article 3.

For the reasons I have cited, I find that there was an error of law and, albeit that the appeal has previously been remitted to the First-tier Tribunal, because of the fundamental nature and extent of the errors, I shall again remit this matter to the First-tier Tribunal.

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Directions

The parties should file and serve skeleton arguments (no more than 10 pages of A4) with any further evidence at least 14 days prior to any substantive hearing.

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 Helen Rimington Date 4th August 2021

Upper Tribunal Judge Rimington