Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-002900**
(PA/50091/2021); IA/03332/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 24th October 2022

Decision & Reasons Promulgated
On the 21 November 2022

Before

UPPER TRIBUNAL JUDGE PITT

Between

LG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Fitzsimons, Counsel instructed by Wimbledon Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

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 their 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.

1. This is an appeal against the decision issued on 27 April 2022 of First-tier Tribunal Judge Barrowclough which refused the appellant's protection and human rights claims.

Background

2. The appellant is a national of Albania born in 2000.

3. The appellant left Albania on 24 August 2015. He arrived in the UK on 14 September 2015 and claimed asylum. On 23 February 2016 his asylum claim was refused but he was granted discretionary leave to remain until 22 January 2018. The appellant appealed against the refusal of his refugee claim but his appeal was dismissed by First-tier Tribunal Judge Chowdhury in a decision issued on 11 October 2016. Judge Chowdhury did not find the appellant to be a credible witness.

4. On 17 January 2018 the appellant applied for further leave to remain. That application was refused on 4 January 2021. The respondent did not accept that the appellant was in need of protection or that he had made out a human rights claim.

5. The appellant appealed against the refusal of further leave and had a hearing before the First-tier Tribunal on 7 April 2022. In a decision issued on 27 April 2022 Judge Barrowclough refused the appeal on all grounds. Permission to appeal against Judge Barrowclough's decision was granted by the First-tier Tribunal on 21 June 2022.

Proceedings in the First-tier Tribunal

6. The appellant maintained that he was at risk in Albania on the basis of a blood feud and because of his learning disability and other medical issues. The appellant's evidence was that his father borrowed money from someone in the Hoxha family, a clan well known to be involved in criminal activities, and that when the loan could not be paid back, Petrit Hoxha made threats against the appellant's father. Petrit Hoxha was subsequently killed and the appellant's father was accused of his murder. This triggered the blood feud which the appellant claimed would put him at risk if he was returned to Albania. The appellant also maintained that he was highly vulnerable on return because of his learning disability and other medical conditions. It was argued for the appellant that the adverse

findings of First-tier Tribunal Judge Chowdhury in the appeal decision from 2016 could be distinguished on the basis of the evidence provided since then, reference being made to the case of Devaseelan v SSHD [2002] UKIAT 702.

7. First-tier Tribunal Judge Barrowclough did not consider that the new medical or country evidence allowed for the decision of First-tier Tribunal Judge Chowdhury to be distinguished. Judge Barrowclough did not find that the appellant was a credible witness concerning the blood feud and did not find that he had made out a protection or human rights claim.

Grounds of appeal

8. The appellant brought five grounds of claim against the decision of First-tier Tribunal Judge Barrowclough. Ground 1 maintained that the judge erred in finding that the appellant was fit to give oral evidence and, in paragraph 39, that "his not doing so does not assist me".

9. Ground 2 maintained that the judge erred in the approach taken to the medical evidence and whether it supported the appellant's claim that the adverse findings of Judge Chowdhury on his credibility could be distinguished.

10. Ground 3 challenged the findings of the First-tier Tribunal on the country expert report, in particular, as to whether it was credible that the Hoxha family would wait before enforcing the loan taken out by the appellant's father and issuing threats to his family.

11. Ground 4 challenged the adverse findings of the First-tier Tribunal regarding the absence of evidence from the appellant's older brother who had made his own asylum claim in the UK.

12. Grounds 5 and 6 maintain that the judge failed to make findings on the alternative basis of claim which arose from the appellant's learning disability and other difficulties.

Discussion and findings

13. Judge Barrowclough was provided with medical evidence setting out that the appellant had a significant learning disability, a profound stammer and that he was a vulnerable witness. The evidence on these matters was set out in a report from Dr Cohen of Freedom from Torture, Dr O'Neill, a Clinical Psychologist and Ms Noah, a speech and language therapist. It was argued for the appellant that this evidence showed that the adverse credibility findings made in 2016 should be distinguished. There had been nothing before the first First-tier Tribunal judge in 2016 on the appellant's learning disability and other difficulties. It was argued that the new materials also showed that the appellant was not fit to give oral evidence.

14. First-tier Tribunal Judge Barrowclough did not find that the appellant was unfit to give oral evidence and did not find that the new medical evidence

supported the appellant's case that the adverse findings from 2016 should be distinguished. Judge Barrowclough set out in paragraph 39:

> 39. As was made clear in Devaseelan, the overriding principle is that every adjudicator must independently determine each new application on its own individual merits. For the reasons given above, I do not find that the various experts' reports restore or enhance the appellant's credibility. The appellant himself chose not to give evidence in this appeal. While I understand and respect that decision, I do not accept the submission that the appellant was not fit or unable to do so, as Dr O'Neill states, for essentially two reasons. First, because Dr Cohen, an equally distinguished and experienced expert, took a contrary view. Secondly and more fundamentally, because the appellant chose and was able to give evidence at his first appeal before IJ Chowdhury in 2016, when he was 16 years old. No doubt that was a difficult and distressing experience for the appellant, but there is nothing in the decision and reasons to suggest that his doing so was virtually impossible or inappropriate. Additionally, from my understanding of the medical experts' reports it appears that all or virtually all of the appellant's current medical conditions were already present at that time. It seems to me that the appellant could have given evidence to this Tribunal as a vulnerable witness, had he chosen to do so. As it is, his not doing so does not assist me.

15. I found the approach taken in paragraph 39 disclosed an error of law. The materials before the First-tier Tribunal did not consist merely of opposing medical opinions from Dr Cohen and Dr O'Neill. Dr Cohen assessed the appellant on 17 March 2021. Dr Cohen is a specialist in physical assessments of asylum seekers. She is a medical doctor and forensic physician. Whilst finding that the appellant was fit to give evidence, her strong recommendation, set out at paragraph 56 of her report, was that the appellant should be assessed by an educational psychologist or learning disability specialist "to identify the extent and nature of his difficulties and disability and the assistance he needs." In paragraphs 72, 74 and 76 she identified aspects of the appellant's learning disability that required further investigation as those were matters that could have a direct and material impact on his ability to give evidence.

16. As a result of the recommendation of Dr Cohen, the appellant was referred to Dr O'Neill. Dr O'Neill assessed the appellant on 26 November 2021. Dr O'Neil is a Clinical Psychologist who works at the Tavistock Clinic. She is a specialist in assessing minor asylum seekers and has specialist experience in the fields of learning disability and mental health. Dr O'Neill was provided with Dr Cohen's report before reaching her own conclusions. As was the case with Dr Cohen, she also had materials from the appellant's community caseworkers, his foster carers and the speech and language therapist before her when reaching her conclusions. Dr O'Neill interviewed the appellant for approximately six and a half hours. Dr O'Neill concluded in paragraph 8.3 that the appellant met the criteria for a significant impairment in cognitive functioning. In paragraph 8.3 she also identified that his IQ was within the "Extremely Low range". In paragraph 8.4 she

identified a significant impairment in his adaptive behaviour and that his adaptive functioning would be in the “Extremely Low range”.

17. In paragraphs 8.12 to 8.15 Dr O’Neill set out why she considered that the appellant was unfit to give evidence to the First-tier Tribunal. She considered that the appellant had PTSD, severe anxiety and distress with regards to his stammer and stress in relation to these proceedings. His shame about his stammer and his limited cognitive abilities would exacerbate his mental health problems and impede his ability to express himself. She considered that his ability to recall events accurately would be impaired and that he did not have sufficient coping skills to deal with the pressures that would be placed on him during the process of giving evidence. Dr O’Neill also had concerns that giving evidence would lead to a deterioration in the appellant’s mental health.

18. The approach of the First-tier Tribunal in paragraph 39 of decision failed to appreciate that Dr O’Neill’s report followed that of Dr Cohen specifically in order for there to be more specialist evidence of the appellant’s cognitive functioning and mental health issues and the impact of those features on his ability to give oral evidence. The reports showed that Dr O’Neil was a specialist in assessing learning disability where Dr Cohen was not. Their position on the appellant’s ability to give oral evidence was not equal, therefore.

19. The First-tier Tribunal also failed to take into account the evidence from the speech and language therapist, Ms Noah, which also maintained that the appellant would find giving evidence “very hard”. It was also not correct to take the appellant having given evidence in 2016 as determinative of his been able to give evidence some six years later and where in 2016 there had been no evidence about his undisputed mental health and learning disability issues.

20. It was my conclusion that the approach taken by the First-tier Tribunal to the appellant’s fitness to give evidence, his status as a vulnerable witness and the part this error played in the decision not to distinguish the adverse findings from 2016 was in error. But for that error, the materials here allowed for different findings on these issues and a different outcome to the appeal. It is therefore my view that the credibility findings underpinning the decision cannot stand and that the decision must be set aside to be remade.

21. It is also my view that ground 2 of the appellant’s challenge was made out. The First-tier Tribunal Judge set out her approach as to the whether the new medical evidence was capable of supporting the appellant’s credibility paragraph 37 of the decision:

> 37. In my judgment the facts of the appellant’s account of the circumstances in which he came to leave Albania are identical and unchanged from those on which he relied at his first appeal. I agree with Mr Iqbal that the appellant has not provided any further evidence to establish that his original account is credible, but relies on the same

> account, albeit with additional evidence concerning his vulnerabilities, and that the submissions now put forward on his behalf are essentially an explanation or justification for what were found by the Tribunal to be inconsistencies in the appellant's evidence, rather than fresh evidence which adds weight to his account. To the extent that it may be suggested that Dr Cohen's report (and to a lesser extent that from Dr O'Neill) are themselves evidence of the existence of a blood feud involving the appellant and the Hoxha clan, I do not agree or accept such a proposition. Whilst I acknowledge that, as Ms Fitzsimons submits, medical reports or evidence *may* provide a factual context within which to assess the allegations before the Tribunal, it seems to me that will usually be of limited assistance (for example when an expert's opinion is that a witness is truthful), unless it amounts to independent objective evidence, such as in the scarring cases that Ms Fitzsimons cites. Similarly, Dr O'Neill's opinion of the appellant's limited capabilities may help to explain one reason why his earlier evidence was confused, but it does not help establish that his account was and is credible. Overall, I find that the medical experts' reports now before the Tribunal do not cure the evidential defects in the appellant's account found by IJ Chowdhury.

22. This approach does not follow the guidance of the higher courts on how to assess whether medical evidence is capable of supporting of an appellant's credibility. In MN and IXU v SSHD [2020] EWCA Civ 174 the Court of Appeal set out in paragraph 121 that "it is open to a doctor to express an opinion to the effect that his or her findings are positively supportive of the truthfulness of an applicant's account (i.e. an opinion going beyond 'near consistency')." The Court of Appeal also confirmed in the same paragraph that comments on credibility from a medical expert:

> "… may also be based on an assessment of the applicant's reported symptoms, including symptoms of mental ill-health, and/or of their overall presentation and history. Such evidence is equally in principle admissible: there is no rule that doctors are disabled by their professional role from considering critically the truthfulness of what they are told."

23. The approach of the First-tier Tribunal Judge in paragraph 39 that the medical reports were of "limited assistance" where they did not concern the physical evidence such as scarring is not consistent with the correct approach set out by the Court of Appeal in MN. Further, Dr Cohen's view was that it was credible that the appellant's post-traumatic stress disorder arose from being threatened by a blood feud. Dr Cohen stated at a number of points in her report that she did not rely merely on what the appellant told her but referred to the other documents provided to her and relied also on her professional observations and findings and an analysis of how the appellant presented. She indicated specifically in paragraph 58 that she had considered the possibility of fabrication.

24. I therefore concluded that the First-tier Tribunal took an incorrect approach to the medical evidence and how it might support the applicant's claim, including as to whether the decision of the First-tier Tribunal in 2016 could

be distinguished. It was again the case that had this error not been made, the outcome of the decision might have been different and the decision must be set aside on the basis of this ground also.

25. It was also my view that ground 3 had merit. The First-tier Tribunal found in paragraph 38 that the expert report of Dr Tahiraj did not provide evidence on the likelihood of the Hoxha gang approaching the appellant's family after a delay. On the contrary, Dr Tahiraj addresses this issue at numerous points in her report, in particular over pages 12 to 14. This is a further error forming part of the adverse credibility findings and decision not to distinguish the 2016 Tribunal decision.

26. I did not find the judge's approach to the absence of evidence from the appellant's brother to be in error. The appellant argues that he was not provided with details of his brother in the UK when he was sent here by his mother and was not advised by his mother to contact his brother. Be that as it may, in the course of these proceedings and during the last seven years of his residence in the UK, it would have been an entirely straightforward matter for enquiries to be made by him, his legal advisers, his social workers or his foster carers to locate the brother. It was open to the First-tier Tribunal to consider that the absence of the appellant's brother's evidence undermined the claim. That conclusion, however, had to be conducted within an otherwise lawful credibility assessment on a holistic basis which, as set out above, I have found not have took place here.

27. Grounds 5 and 6 argue that the First-tier Tribunal did not address the appellant's protection claim put on the basis of his mental health and disability or the Article 8 ECHR claim on the same basis. I accept that that is so and that where the assessment of the appellant's credibility and assessment of his mental disorders was erroneous as set above, these are also material errors of law.

Conclusion

28. For all of these reasons, I find that the decision of the First-tier Tribunal discloses an error on a point of law such that it must be set aside. It was also my view that the errors of law were such that the credibility assessment and consideration of whether the decision of Judge Chowdhury could be distinguished had to be remade de novo. Where that was so, it was my conclusion that the decision had to be remade in the First-tier Tribunal.

Notice of Decision

29. The decision of the First-tier Tribunal discloses an error on a point of law.

30. The decision of the First-tier Tribunal is set aside to be remade afresh in the First-tier Tribunal.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 7 November 2022