IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005476

First-tier Tribunal No: PA/51628/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 19th of March 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL
and
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GS (Albania)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Clarke, Senior Presenting Officer
For the Respondent: Ms Fitzsimons, instructed by Islington Law Centre

Heard at Field House on 29 January 2024

DECISION AND REASONS

1. Anonymity was ordered by the First-tier Tribunal and that order continues in force.

2. The Secretary of State appeals with the permission of First-tier Tribunal Judge Parkes against the decision of First-tier Tribunal Judge M L Brewer (as she then was). By her decision of 1 November 2023, the judge allowed GS's appeal against the respondent's refusal of his claim for international protection. The appeal was allowed on Refugee Convention and Articles 3, 4 and 8 ECHR grounds.

3. To avoid confusion, we will refer to the parties as they were before the FtT: GS as the appellant and the Secretary of State as the respondent.

Background

4. The appellant is an Albanian national who was born on 16 December 1998. He entered the United Kingdom with a visit visa on 12 July 2014. He applied for asylum in person on 30 July 2014. That claim was refused on 27 November 2015. He appealed against that decision, and his appeal was heard by First-tier Tribunal Judge Talbot. Judge Talbot found the appellant's account of having been the victim of domestic violence and child labour exploitation at the hands of his father to be a fabrication and he dismissed the appeal. There was no appeal to the Upper Tribunal against that decision.

5. There was a referral to the National Referral Mechanism on 31 July 2015. The appellant received a positive reasonable grounds decision but a negative conclusive grounds decision was reached thereafter, on 2 November 2015. Further protection submissions were made in 2016 and refused in 2017. Yet further submissions were made in July 2021 and refused on 23 June 2022. It was accepted that these second submissions amounted to a fresh claim, however, and the appellant was consequently able to appeal against the refusal to the First-tier Tribunal.

The Appeal to the First-tier Tribunal

6. The appellant's appeal was heard by the judge, sitting at Taylor House, on 26 October 2023. The appellant was represented by Ms Fitzsimons of counsel, as he was before us. The respondent was also represented by counsel, Ms Ahmad.

7. The judge received substantial documentary evidence from both parties. That included the decision of Judge Talbot and reports from two experts instructed by the appellant: Dr Fairweather (a Consultant Psychiatrist) and Jana Arsovska, a country expert on Albania. The judge heard oral evidence from the appellant and from the appellant's girlfriend and friend.

8. The judge's reserved decision was issued five days after the hearing. It runs to 28 pages of single-spaced type and is, on any view, the product of considerable thought. The structure of it, and the essential conclusions reached by the judge, might properly be summarised as follows.

9. The judge framed the issues and recorded the ways in which they had been narrowed by counsel at [3]-[6]. At [9]-[20], she set out a detailed summary of the appellant's account of his life in Albania. At [21]-[22], she summarised the conclusions reached by Judge Talbot and the reasons he had given for dismissing the appellant's first appeal. She recorded what the appellant said about his current family circumstances in Albania at [23].

10. At [24]-[27], the judge considered in some detail what was said by Dr Fairweather about the appellant's mental health, including her view that he suffered from PTSD and depression and that it was likely that he had had some symptoms of mental ill health at the time of the initial decision and the appeal before Judge Talbot. At [28]-[30], the judge touched on the oral evidence given by the appellant and his witnesses.

11. The judge's analysis began at [31]. Under the sub-heading "Devaseelan", she explained why she considered it necessary to consider the appellant's credibility

on the basis of all of the evidence before her, rather than treating that question as having been settled by Judge Talbot's decision. There were two principal reasons. Firstly, that the appellant had not been treated as a vulnerable witness despite his minority at the time. Secondly, that the appellant was reasonably likely to have been suffering from symptoms of poor mental health both during his asylum interview and his appeal hearing before the first judge. That detailed analysis took place over the course of [32]-[35].

12. From [36]-[51], the judge reached her own conclusions in relation to the appellant's credibility. In doing so, she drew heavily on Dr Fairweather's report and she revisited the matters which had concerned Judge Talbot with the benefit of that report. Having taken account of those matters, and having set the appellant's account in the context of the background material, including the expert report of Ms Arsovska, the judge concluded that the appellant had 'provided a core account of domestic violence which has remained consistent and detailed' and that the appellant's mother 'continues to be a victim of domestic violence and his father has amassed debts to fund his lifestyle (gambling and alcoholism): [49] and [50] refer.

13. At [52]-[55], the judge explained why, on the basis of the facts she had found, she had concluded that the appellant was a victim of child trafficking for forced labour exploitation. She accepted that the appellant had been required by his father, on pain of physical punishment, to work at a car wash as a child.

14. At [56]-[64], the judge concluded that the risk to the appellant in his home area continued. She concluded that there was an ongoing risk of further domestic violence and exploitation at the hands of his father: [61]. She did not consider that he would seek the assistance of the police, who had failed to provide any protection for his mother, and she found that the shelters which were provided for victims of trafficking in Albania were not for men or boys. The latter conclusion was based on Ms Arsovska's report.

15. At [65], the judge accepted that the appellant's claim engaged the Refugee Convention for the following reasons:

> I have found that this appellant was a child victim of trafficking for labour exploitation. I am satisfied that former victims of trafficking in Albania are members of a Particular Social Group because of their shared experience of having been trafficked. I find that child victims of labour exploitation have a common immutable characteristic, namely their experience of having been trafficked and that shared possession of that characteristic establishes the existence of a PSG.

16. For reasons she gave at [66]-[76], the judge found that the appellant could not relocate in Albania so as to avoid the risk from his father. She found for the appellant in both limbs of the internal relocation analysis. Firstly, that the appellant would not be safe in another part of Albania because his father – who was 'motivated to locate the appellant' would be able to find him in Albania. Secondly, that relocation would be unduly harsh as a result of the appellant's mental health problems. The appeal was therefore allowed on Refugee Convention Grounds. The Article 3 ECHR conclusion followed the conclusion under the Refugee Convention. The judge gave reasons for finding in the appellant's favour on Article 4 ECHR grounds at [78]. At [79], she found that the appellant satisfied the Private Life Immigration Rules because there would be

very significant obstacles to his re-integration to Albania. That conclusion was premised on the conclusions she had reached earlier, and caused her to allow the appeal on Article 8 ECHR grounds.

The Appeal to the Upper Tribunal

17. The Secretary of State sought permission to appeal on the basis that the judge had failed to give adequate reasons for finding that the claim engaged the Refugee Convention; that the findings regarding internal relocation were also insufficient; and that the judge had failed to explain altogether how the appellant's mental health problems reached the threshold in AM (Zimbabwe) [2022] UKUT 131 (IAC). Judge Parkes considered those grounds to be arguable. His decision is dated 17 December 2023.

18. On 12 January 2024, before any response to the grounds had been issued by the appellant's solicitors, Mr Clarke filed and served a skeleton argument in which he sought to develop the original grounds of appeal and to introduce three new grounds. These were that the judge had erred in her treatment of Dr Fairweather's report (ground four); that she had erred in her approach to Devaseelan [2003] Imm AR 1 (ground five); and that she had given inadequate reasons for rejecting the conclusion reached in the NRM's conclusive grounds decision (ground six).

19. We considered the application to amend the grounds at the outset of the hearing. We accepted Ms Fitzsimons' submission that the application to amend the grounds was significantly late and that the instruction of Mr Clarke in mid-January did not amount to a good reason to extend time. Having concluded that there appeared to be arguable merit in the amended grounds, however, and having noted that Ms Fitzsimons had confirmed that she would not be prejudiced by their admission, we indicated that we would hear argument on those grounds.

Submissions

20. For the Secretary of State, Mr Clarke relied on his comprehensive skeleton argument and submitted that his fourth ground was clearly made out and that the decision fell to be set aside as a whole if that was so. The judge had in his submission treated the Fairweather report as essentially unchallenged by the respondent when that was plainly not the case. As to ground five, Mr Clarke submitted that the judge had impermissibly adopted what he described as a 'relitigation approach', rather than treating the first judge's decision as a starting point in accordance with Devaseelan [2003] Imm AR 1. Even if the appellant was a vulnerable witness at the time of Judge Talbot's decision, that point had not been taken on appeal to the Upper Tribunal and did not justify the wholesale revisitation of his findings of fact.

21. Ms Fitzsimons submitted that there was no legal error in the judge's decision, whether as suggested in the original or the amended grounds. Addressing us on the fourth ground first, she submitted that she had set out a complete answer to this multi-faceted ground at [16]-[24] of her skeleton argument. It had clearly been open to the judge, she submitted, to attach the weight which she had to the report of Dr Fairweather and to conclude that it provided ample justification for concluding that the previous proceedings might have been tainted by the appellant's mental health at the time. She submitted that the respondent's challenge was not based on a fair reading of the judge's decision. The judge had

been cognisant of the absence of recourse to mental health support via his GP and that was a matter on which Dr Fairweather had touched.

22. As to ground five, Ms Fitzsimons submitted that it had been open to the judge to consider what steps had or had not been taken by the judge in the first appeal. It was undeniable that the appellant was a vulnerable witness by reference to his age but that had not been taken into account by the judge. There had been no cross-examination on the points which were made in this ground about the appellant's screening interview and the loss of his passport. The judge's self-direction in relation to Devaseelan had been impeccable.

23. As to ground six, it was clear that the appellant knew nothing about the way in which his passage to the UK had been arranged and the reasons given by the NRM for doubting his credibility were unsound. The judge was plainly aware that there was a negative NRM decision. That was obviously not determinative of his credibility and there was an entirely new body of evidence before the judge.

24. The respondent was simply wrong in the original grounds to submit that the judge had allowed the appeal on Article 3 ECHR 'medical' grounds. There was obviously a Convention reason. The judge had accepted the appellant's past, and that there was a risk of future ill-treatment. The Secretary of State's grounds in relation to internal relocation represented nothing more than disagreement. The judge had been entitled on the facts of the case to conclude that the appellant would not be able to relocate safely, and that relocation would be unduly harsh in any event.

25. Mr Clarke replied, contending that the appellant's reading of [35] of the judge's decision was unsustainable. The judge had failed to engage with what was said in the Review about the report of Dr Fairweather. The judge's decision was also vitiated by her failure to deal with the conclusions in the NRM's final decision. It was not clear that the judge even understood that the appellant's claim to be at risk as a result of his father's debts was a new claim.

26. We reserved our decision at the conclusion of the submissions.

Analysis

27. We remind ourselves at the outset of what was said by Lady Hale at [30] of SSHD v AH (Sudan) [2007] UKHL 49; [2008] 1 AC 678. What was said there about the restraint which must be exercised on appeal has since been echoed and reinforced in cases such as Perry v Raleys Solicitors [2019] UKSC 5; [202] AC 352. The approach we adopt to the First-tier Tribunal's findings of fact reflects what was said by Lewison LJ at [2] of Volpi v Volpi [2022] EWCA Civ 464; [2022] 4 WLR 48:

> i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

28. In our judgment, those principles apply to the Upper Tribunal considering an appeal on a point of law under ss 11-12 of the Tribunals, Courts and Enforcement Act 2007 as they do to an ‘appeal court’ properly so called.

Ground 4 – erroneous consideration of medical evidence

29. It is appropriate to consider Mr Clarke’s fourth ground first. As he observed, and as we think Ms Fitzsimons was minded to accept, the judge’s decision falls to be set aside as a whole if this ground is made out.

30. The Secretary of State’s case is that the judge erred in concluding that the Fairweather report provided any proper basis for entitling her to depart from the findings of Judge Talbot. Before we consider the substance of that ground, however, it is necessary to consider the proper approach to findings of fact made by a previous immigration tribunal. Such findings are not *res judicata* and a party is not estopped from seeking to persuade a second tribunal to take a different view. The findings represent a starting point, not a straitjacket, and the later authorities have emphasised that the strength of the Devaseelan guidelines lies in their flexibility and the fact that they do not impose any unacceptable restrictions on the second judge’s ability to make the findings which she conscientiously believes to be right. If authority for these propositions is needed, it can be found at [31]-[39] of the judgment of Rose LJ (as she then was) in SSHD v BK (Afghanistan) [2019] EWCA Civ 1358; [2019] 4 WLR 111, with which Floyd and Baker LJJ agreed. We note that Rose LJ’s review of the authorities contained significant citation from Djebbar v SSHD [2004] EWCA Civ 804; [2004] Imm AR 497.

31. Judge Brewer was evidently well aware of these principles, since she cited Djebbar at [32] of her decision. As we have recorded above, she considered that it was necessary to revisit Judge Talbot’s findings of fact because the appellant

was reasonably likely to have been suffering from mental health problems at the date of the hearing and because he was a minor, aged seventeen, at that time.

32. Whatever might be said by Mr Clarke about the first of those reasons, the fact remains that the appellant was a minor at the date of the hearing before Judge Talbot. That fact brought with it an obligation to treat the appellant as a vulnerable witness, both during the hearing and in the decision which followed. The judge was obliged to consider, in his decision, whether any difficulties with the appellant's evidence might be attributable not to untruthfulness but to his vulnerability: AM (Afghanistan) v SSHD [2017] EWCA Civ 1123; [2018] 4 WLR 78 refers, endorsing *Joint Presidential Guidance Note No 2 of 2010* in this respect. It is quite clear from Judge Talbot's decision that he did not do so. The judge was aware of this; she cited AM (Afghanistan) v SSHD at her [35]. Regardless of any error which she is said to have made in relation to Dr Fairweather's report, the judge was entitled to re-open the question of the appellant's credibility, and not to regard it as settled by Judge Talbot's analysis, because of his evident failure to adopt the approach required of him to the evidence of a child.

33. In any event, we do not consider that the judge erred in any respect in her consideration of Dr Fairweather's report. Mr Clarke submits that the judge proceeded on a mistaken basis of fact when she concluded that the respondent did not call into question the psychiatrist's conclusion that the appellant suffered from poor mental health during his asylum interview and his first appeal hearing. Mr Clarke points in his skeleton argument to the respondent's Review, at [25], wherein the respondent had noted that there was 'no verification of the date of the onset of the conditions' and there was no 'independent medical evidence … to determine the diagnosis, prognosis and treatment … of the appellant's reported mental health conditions.'

34. At the risk of stating the obvious, however, the respondent's review was not the respondent's last word in this case before the FtT. The respondent was represented by counsel before the FtT. The judge recorded that this aspect of the Fairweather report was not challenged before her and there is nothing before us from the respondent's counsel to suggest that the judge recorded her submissions incorrectly. Proceedings before the FtT are adversarial and the judge was not required to go behind the stance adopted by counsel for the respondent and to treat as challenged something which was not contested in the submissions made before her: JK (DRC) v SSHD [2007] EWCA Civ 831. We also note that it was positively asserted by the appellant that he had been suffering from undiagnosed mental health problems at the time of his asylum interview. If that was to be challenged by the respondent, it was a point to be put in cross-examination (Ullah v SSHD [2024] EWCA Civ 201), and there is no suggestion that any such challenge was pursued by the respondent's counsel.

35. Mr Clarke submits in his amended grounds that there was 'zero corroborative evidence of any mental health presentation before Dr Fairweather's assessment'. The short answer to that complaint is that no such corroboration was required; the judge was entitled to accept the view of the expert that it was reasonably likely that the appellant was suffering from mental health problems in 2016.

36. Mr Clarke submits that the judge failed to have regard to the fact that the appellant had not presented any such complaints to his General Practitioner, and he submits that cases such as HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 required the judge to take that into account. The difficulty

with that submission is that the judge was evidently well aware that the appellant had not turned to his GP, either in the past or more recently, following Dr Fairweather's report. She made reference to what was said by Dr Fairweather in the former connection at [24] and to what was said by the appellant in the latter connection at [28]. The judge clearly knew that the appellant's medical records would not disclose that any assistance had been sought through the NHS for mental health problems. The expert report did not seek to 'brush aside' the absence of such recourse; it engaged with that absence in the manner recorded by the judge at [24]. The expert accepted that the appellant might have had a myriad of reasons for not engaging with the NHS, and it is clear that the judge accepted what was said in that regard.

37. Ground four finishes with a familiar citation from JL (China) [2013] UKUT 00145 – "The more a diagnosis is dependent on assuming that the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it." There is no reason to think that this experienced judge was not aware of that long-standing dictum, which was based on something said by the Court of Appeal in 2007. The weight which she attached to Dr Fairweather's report was a matter for her. She considered that report in light of the competing arguments which were, and were not, pursued before her. She was entitled to attach significant weight to it for the reasons that she gave and we do not consider ground four to establish any legal error in those conclusions.

38. In addition, therefore, to the appellant's minority at the date of the first appeal hearing, the judge was entitled to attach weight to what was said by Dr Fairweather about the appellant's likely mental health at that time. We do not accept the submission that the judge's assessment of the appellant's credibility set off down the wrong path when she decided that there were proper reasons to revisit the conclusions reached by the first tribunal in 2016.

Ground 5 - impermissible departure from Judge Talbot's decision

39. The Secretary of State's fifth ground, as amended, overlaps with the fourth to a significant extent. We have already explained why we do not consider that the judge erred in her approach to the inherently flexible Devaseelan guidelines, and why the judge was entitled to attach significance to the appellant's minority in 2016 despite the fact that there was no appeal from Judge Talbot's decision. At [24]-[28] of Mr Clarke's skeleton, he comes close to submitting that Judge Brewer was not entitled under any circumstances to depart from Judge Talbot's findings. As we have already endeavoured to explain, the judge would have erred in law if she had adopted the approach now contended for by the Secretary of State; those findings were a starting point, not a straitjacket, and the judge was entitled to revisit those findings for the reasons that she gave.

Ground 6 – failure to consider NRM decision

40. The Secretary of State's sixth ground also overlaps with ground four to some extent. The point which stands alone is that which is made by Mr Clarke at [30] of his skeleton. It is submitted there that the judge failed to consider a point which was made against the appellant's credibility in the NRM decision. The point in question was that that it was not plausible that the appellant had been able to afford a visit visa when it was suggested that his father was an alcoholic gambler and his mother did not work.

41. We very much doubt – in light of JK (DRC) v SSHD – that it is incumbent on a judge in an immigration tribunal to pursue and address individually points which are made in a refusal letter which are not pursued by the respondent's representative. Toulson LJ (as he then was) rejected that 'broad proposition' when it was advanced by the Secretary of State in that appeal, and Arden LJ (as she then was) and Pill LJ agreed. The point applies *a fortiori* to the decision of the NRM, however. That decision was not the decision under appeal before Judge Brewer and there was certainly no obligation on her to trawl through that decision and to identify points which might have benefitted the Secretary of State even if they were not pursued by counsel for the respondent before her.

42. We think that the point was devoid of merit in any event. It has been the appellant's case from the outset that his uncle and others arranged his visit visa. Beyond that he knows nothing about the process. It has also been his case throughout that his uncle was better off and had, on occasion, provided financial assistance to the appellant's parents. It was he, for example, who is said to have paid the schoolteacher who had threatened the family because of a debt owed to him by the appellant's father.

43. We reject the Secretary of State's sixth ground for those two reasons, therefore.

Ground 1 – inadequate reasons - engagement of Refugee Convention

44. In supposed amplification of the respondent's first ground, Mr Clarke seeks to make a point which was not in fact prefigured in the original grounds. He submits that the appellant's account that his father owed money to various people was a new point which had not been advanced before Judge Talbot, and that the judge failed to consider the credibility of the assertion in that light. Again, however, there is nothing before us to show that this point was pursued, or even mentioned, by the respondent's counsel in the FtT. It might have been a good point, or the appellant might have had an answer for it, but what is clear on the authorities is that it was not incumbent on the judge to identify the point for the respondent and then to evaluate it. Had she done so, and asked questions on the point of her own volition, she might with some justification have been said to have entered the arena. We do not consider that the judge had to engage with this point of her own volition, and we consider that the judge was entitled to reach the finding which she set out in this way at [62]:

> I have found that the appellant's evidence of his ongoing violence against his mother, his continuing alcoholism and his debt are all credible. I find that there is no good reason why this appellant would not be at risk again of further domestic violence and exploitation from his father in all the circumstances.

45. The judge went on to find in that paragraph that there was a real risk that the appellant's father would again target him with violence and exploit him for financial gain. These findings – both evaluative and of primary fact – were properly open to the trial judge for the reasons that she gave. Applying the approach in Volpi v Volpi, the Upper Tribunal has no proper basis on which to interfere with those findings. They are evidently not plainly wrong in the sense defined by Lewison LJ.

46. The only submission which we received from Mr Clarke in relation to the engagement of the Refugee Convention was that which he made in his skeleton

argument. At [42], he submitted that there 'was inadequate reasoning … as to why A falls within a [particular social group] as a family member of an historically abusive father.' He added that the appellant was a child at the time of the abuse and that characteristic was no longer present. That is to misunderstand the conclusion reached by the judge, however. We have reproduced that conclusion in full at the start of this decision. The judge did not conclude that the appellant fell within a Particular Social Group of child victims of trafficking from Albania. She held merely that the group was 'former victims of trafficking in Albania' and, as Ms Fitzsimons contends in her skeleton argument, that finding is one which was open to the judge in light of the authorities and the background material which was before the judge.

Ground 2 – inadequate reasons – internal relocation

47. The respondent's second ground, as originally pleaded, complained that the judge had given insufficient reasons for concluding that internal relocation would not avail the appellant. As Ms Fitzsimons submitted, however, this ground represents nothing more than a series of disagreements with the judge's decision on the merits. The judge gave detailed reasons for concluding that the appellant's father would have the motive and the means to find him in Albania. Those conclusions were based upon and supported by the expert evidence of Ms Arsovska. We might not have found that the appellant would be at risk from his father throughout Albania but that is nothing to the point. It was for the judge to undertake that evaluation and she concluded for perfectly intelligible reasons that there would be such a risk.

48. For similar reasons, we conclude that there is nothing in the respondent's complaint that the judge gave insufficient reasons for concluding that internal relocation would be unduly harsh for this particular appellant. She considered that he has mental health problems, and that there would be no shelters available for him, as a man. Both experts had expressed concern about his ability to relocate. Given those points, and the fact that he has been in the UK for many years and has no experience of living in Albania as an adult, it was open to the judge to conclude that internal relocation would be unduly harsh.

Ground 3 – threshold error – Article 3 medical claim

49. Ground three represented a challenge to the judge's decision to allow the appeal on Article 3 medical grounds. We need only say that this ground is misconceived; the judge did not allow the appeal on that basis. Her Article 3 conclusion merely followed from her conclusions on the Refugee Convention.

50. For all of these reasons, therefore, we conclude that the decision of the First-tier Tribunal does not contain a material error of law.

Notice of Decision

The Secretary of State's appeal is dismissed. The decision of the FtT to allow the appeal shall stand.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 March 2024