**Upper Tier Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/05634/2012

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 10 September 2014** | **On 2 March 2015** |

**Before**

**Deputy Upper Tribunal Judge Pickup**

**Between**

**Secretary of State for the Home Department**

Appellant

**and**

**JG**
**[Anonymity direction made]**

Claimant

**Representation:**
For the claimant: Ms R Chapman, instructed by Birnberg Peirce & Partners
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The claimant, JG, date of birth 1.1.78, is a citizen of Afghanistan.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Canavan, who allowed the claimant's appeal against the decision of the respondent to refuse his asylum, humanitarian protection and human rights claims. The Judge heard the appeal on 27.2.14.

3. Designated First-tier Tribunal Judge McCarthy refused permission to appeal on 7.4.14. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge C Lane granted permission to appeal on 28.4.14.

4. Thus the matter came before me on 10.9.14 as an appeal in the Upper Tribunal.

**Error of Law**

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Canavan should be set aside.

6. Although the claimant claimed asylum on 16.6.08, the decision of the Secretary of State refusing his claim was not made until 28.5.12. His appeal against that decision was dismissed in May 2013, but following an application for permission to appeal to the Upper Tribunal the matter was remitted to the First-tier Tribunal for a fresh hearing, heard before Judge Canavan on 27.2.14.

7. The essence of the Secretary of State's case before the First-tier Tribunal was that the claimant had admitted in interview engaging in conduct as a Taliban fighter which gave rise to serious reasons for considering that he fell within Article 1F(a) and (c) of the Refugee Convention and as such a certificate was issued excluding him from the protection of Article 33(1) of the Refugee Convention. The Secretary of State also concluded that he would not be at risk on return, relying on the country guidance of PM & Others (Kabul – Hizb-i-Islami) Afghanistan CG [2007] UKAIT 00089.

8. In essence, these were the two issues in the appeal: whether the claimant was excluded from protection; and whether he was at risk on return. In respect of the latter issue, there was also a primary factual issue as to whether he had escaped from detention or in fact been released.

9. In her careful and detailed determination, Judge Canavan reached the conclusion that the evidence of the claimant's activities in Afghanistan, principally from his interviews, was insufficiently reliable to justify exclusion from protection under Article 1F(a) and in respect of Article 1F(c) insufficiently clear and credible or strong to justify exclusion from protection of the Convention.

10. From §41 onwards, the judge then turned to consider the claimant's risk on return and at §48 - §50 concluded that it is reasonable to infer that the Afghan authorities are likely to have an adverse interest in the claimant and that there is a serious possibility that he would be at risk of serious harm if detained for questioning as an escaped Taliban prisoner.

11. In the circumstances, the appeal was allowed on refugee and human rights grounds.

12. As drafted, the grounds of application for permission to appeal are very short. It is submitted that the judge adopted a perverse approach, finding that the claimant's mental state only affected his ability to give cogent evidence in respect of war crimes,

but did not affect any of the other evidence. "It is respectfully submitted that the judge cannot in effect pick and chose which evidence is affected by his mental health and which is not, without giving any reason why this is so, particularly in light of the serious nature of the offences which he initially admitted to."

13. Before me, Mr Tufan raised further grounds, which he claimed were 'Robinson obvious.' First, that the medical evidence submitted on behalf of the claimant did not state anywhere that he would confess to serious offences that he did not commit. Second, that the judge was looking for reasons to allow the appeal and between §43 and §48 ignored or 'overturned' the country guidance in PM & Others, wrongly deciding that it was not to be applied.

14. In granting permission to appeal, Judge Lane observed that the First-tier Tribunal Judge noted that the claimant may have been so mentally unwell at the time of his asylum interview that the answers given were not reliable. However, elsewhere in the determination, for example at § 42 where the judge found that the appellant had given "a broadly consistent" account of his escape from detention, the appellant's evidence appears to have been accepted as reliable. "It is argued that the judge should have given reasons for accepting parts of the appellant's account whilst rejecting other parts; the appellant seems to have struggled to give evidence both at interview and at the hearing before the First-tier Tribunal."

15. With respect to the Secretary of State and Judge Lane, and for the reasons set out below, I find that the grounds of appeal substantially misstate the judge's determination. It is unfair and inaccurate to suggest that there was an inconsistency between findings as to the claimant's evidence in relation to Article 1F and acceptance of other parts of his account when addressing risk on return.

16. I agree with the view taken by Judge McCarthy in refusing permission to appeal.

> "The grounds are misguided. The author of the grounds ignores the fact that the approach to the assessment of issues relating to exclusion from refugee status is different to that relating to the assessment of risk or persecution and risk on return. The judge was clearly aware of the different legal approaches; she refers to them in paragraphs 13 and 31. The judge recognised that the Secretary of State relied on the appellant's own admissions of "war crimes" that he made during his asylum interview. The judge recognised that the interview process had not been sufficiently robust to obtain such a confession and given the standard of proof that applied to the assessment of exclusion was entitled to find that the evidence did not show that the admissions were reliable.
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> "In addition, the judge recognises throughout her determination that the appellant's testimony is weakened because of his mental health condition. In assessing risk of persecution and risk on return, she relies not simply on his accounts but on the additional expert evidence provided and the facts that were agreed. In so doing she applied the relevant legal approaches to these issues, which were different from those relating to exclusion. As the judge was very careful to assess all the evidence and applied the relevant legal provisions, the grounds are not made out and permission to appeal is refused."

17. I am satisfied on reading the determination that it addressed, took into account, and dealt with all the evidence before the Tribunal, resolving relevant issues and giving cogent reasons for the findings made and conclusions drawn. It was a careful and considered determination.

18. At §13 the judge set out the relevant standard when considering exclusion from protection. There has to be "serious reasons for considering" that the claimant had individual responsibility for acts coming within the scope of Article 1F. Relying on Al Sirri & DD (Afghanistan) [2012] UKSC 54, "serious reasons" is stronger than "reasonable grounds." The evidence must be "clear and credible" or "strong." This is not a requirement to be satisfied beyond reasonable doubt, but it is unlikely to be sufficient unless the decision maker can be satisfied on the balance of probabilities that he is. In relation to article 3, and the burden on the claimant to establish his claim, he has to show that there is a real risk that he will be subjected to persecution or serious harm.

19. It is thus clear that there is a very different standard of proof required in relation to the two issues in the appeal. The judge set about her task in relation to the issue of exclusion by considering both the evidence of admissions against interest by the claimant during his interviews, and the evidence as to his physical and mental health at the time of the interview and thereafter.

20. At §25 the judge correctly stated that she had to assess how reliable the interview record is and the weight to be placed on the apparent admissions. In some 15 subparagraphs to §25, the judge analysed the interview record and the admissions made. A number of criticisms are made as to the conduct and structure of the interview. Three different medical reports were assessed, together with more up to date evidence as to the claimant's health. At §26 the judge accepted that taken alone some of the specific answers appear to be serious admissions, including that he had killed "many people" and had engaged in torturing people.

21. At §27, however, the judge sought to take a step back and put the evidence of admissions in context to his answers as a whole, which were very confused and in many cases unclear. It was not clear, for example, whether the claimant was admitting having killed people himself or whether he was referring to the Taliban collectively or more generally. The judge rightly pointed out that many questions were left unclarified and unresolved, such as whether his killing of many people was in the context of an internal armed conflict against other fighting units or against civilians and thus amounting to a war crime. The judge complained that insufficient follow up questions were asked in relation to his apparent involvement in torture.

22. The assessment was not all one-sided as the grounds suggest. At §30 the judge recognised that the claimant may have been obfuscating in order to reduce his personal responsibility for such crimes. In some cases he failed to answer questions direction. The judge also noted that he was evasive in evidence at the First-tier Tribunal hearing. At §31 the judge agreed that his apparent admission to being a Taliban commander at the time of well-documented abuses gave rise to a suspicion

that he may have committed acts that would give rise to exclusion from the Convention. However, the judge pointed out that suspicion is insufficient to conclude that there are serious reasons for considering that he had individual responsibility for such acts. At §32 the judge accepted that if considering the interview record alone the evidence might be sufficient to reach the serious reasons for considering threshold. However, the judge then went on from §33 to consider the other evidence before her.

23. That evidence included the medical and mental health evidence, as well as comments he made about how he felt during the course of the interviews. After considering this evidence the judge reached the conclusion at §36 that there was real doubt as to the reliability of his admissions in interview. "The extent of his mental health problems are so significant that they could have seriously impacted on his ability to comprehend the questions put to him." On close assessment of the apparent admissions in §37, the judge found they were not as clear-cut as might at first appear. Considering the evidence as a whole, the judge reached the conclusion that the admissions could not be given serious weight and, at §38, "the medical evidence is sufficiently strong to cast real doubt on the reliability of the appellant's evidence at interview."

24. Taking a restrictive and cautious interpretation of the exclusion clauses, bearing in mind the serious consequences of exclusion, at §38 the judge found that "whilst there is evidence that creates suspicion it is not sufficiently reliable (to) meet the threshold of "serious reasons for considering" that the appellant had individual responsibility for acts that amounted to war crimes or crimes against humanity as defined in the international instruments. As such I conclude that there is insufficiently reliable evidence before me to exclude the appellant under Article 1F(a) of the Refugee Convention." The judge reached a similar conclusion at §39 in relation to Article 1F(c).

25. I find that, whilst another judge may have reached somewhat different conclusions, the conclusions of the First-tier Tribunal Judge were ones open to her and for which she has given careful and cogent reasoning. It is very clear that the judge has given the most anxious scrutiny to the evidence and carefully considered the findings to be made.

26. In the circumstances, I find no error in respect of this aspect of the determination. In fact, the grounds do not specifically suggest that this part of the decision is flawed, but complain that the findings in respect of risk on return are inconsistent with the findings in respect of exclusion from protection and thus the determination as a whole is perverse. For reasons set out below, I find that submission is not made out.

27. First, as set out above, there is a very different standard of proof in relation to risk on return and article 3 of the Convention. The claimant only has to demonstrate a reasonable degree of likelihood of risk of harm on return. The judge set that out twice in the determination, at the outset and reminded herself of it at §41.

28. Second, it is clear from the refusal decision that the Secretary of State accepted a large part of the claimant's account. In large measure, as summarised by the judge at §20, the Secretary of State's assessment of the claimant's credibility relied on his inability to give clear and consistent dates for events. However, many of the events he did describe were accepted as consistent with the background evidence. It is accepted that he was captured by the Northern Alliance in 2001 and detained for a number of years without charge or trial. It is also accepted that he was severely ill-treated in detention, an account consistent with the medical evidence. The judge considered at length, commencing from §42 the claimant's account of his escape, which was broadly consistent with the background evidence but more significantly with the expert evidence of Mr Foxley, a former MOD analyst in Afghanistan.

29. It is neither accurate nor fair to suggest that on the basis of his mental health the judge chose to disregard parts of his evidence as to the commission of atrocities but relied on other aspects of his case. That is an oversimplification, not justified by a careful reading of the determination. It is not necessary for me to summarise all the judge's findings in respect of risk on return, but it is significant to point out that in large measure the claimant's account was:

    (a) Accepted by the Secretary of State;

    (b) Consistent with the background evidence;

    (c) Supported by medical evidence;

    (d) Supported by expert evidence;

30. In essence, much of the claimant's background account of events and locations was either accepted by the Secretary of State or found to be consistent with other evidence, even though he has been vague, inconsistent, or evasive as to dates and level of involvement. In the circumstances, I do not accept the submission of Mr Tufan that there is an inconsistency between accepting this account, including escape from detention, and the finding that the evidence of admission was too unreliable to reach the higher evidential threshold to exclude him from protection.

31. It was in the light of the judge's over assessment, that she accepted the claimant's account of escaping from detention when the Taliban intercepted the transport of prisoners. Significantly, it was an account that Mr Foxley considered to be "highly plausible."

32. It was also "highly plausible" that the claimant would remain of interest to the Afghan authorities if his personal history became known to Afghan intelligence or security authorities. Thus at §48 the judge reached the conclusion that there was a reasonable degree of likelihood that the claimant would be of continued interest to the Afghan authorities if returned and a serious possibility that he could be detained and questioned as a known Taliban fighter. The fact that he had been detained and tortured in the past, which had been accepted, was a serious indication that he is likely to be at risk of suffering similar ill-treatment if returned to Afghanistan.

33. I find no error of law in the judge's distinguishing of PM & others at §48. The judge gave a number of different reasons for doing so, including more recent background and expert evidence.

34. In light of the fact that he has been previously recruited into armed insurgent groups, the judge considered it at least likely that he may be approached to join such groups again, even though he may not wish to do so. However, the judge found that in the light of his current physical and mental health problems there was insufficient evidence to show a real risk of forcible recruitment.

**Conclusions:**

35. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains allowed.

Signed: Date: 10 September 2014

Deputy Upper Tribunal Judge Pickup

Paragraph 36 of the decision amended pursuant to Rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008, in to correct a clerical error.

Signed: Date: 26 February 2015

Deputy Upper Tribunal Judge Pickup

**Anonymity**

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I continue the anonymity order.

**Fee Award** **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable in this case.

Signed: Date: 10 September 2014

Deputy Upper Tribunal Judge Pickup