



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/02162/2017

THE IMMIGRATION ACTS

**Heard at Columbus House, Decision & Reasons Promulgated
Newport
On 15 February 2018** **On 8 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

SMH
(anonymity direction made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr S Clarke, Counsel instructed by Migrant Legal Project

For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Rhys-Davies in which he dismissed the appeal of the Appellant, a citizen of Ethiopia, against the Secretary of State's decision to refuse asylum and issue removal directions.
2. The application under appeal was refused on 9 February 2017. The Appellant exercised his right of appeal to the First-tier

Tribunal. This is the appeal which came before Judge Rhys-Davies on 2 June 2017 and was dismissed. The Appellant applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Gillespie on 13 October 2017 in the following terms

“It is arguable that the learned judge, although he acknowledged the appellant to be a vulnerable witness with “significant mental health issues”, erred in failing to identify and to record the effect, if any, which it was considered the vulnerability of the appellant had on the evidence led and the account taken of the same in the assessment of the evidence.”

3. By a rule 24 response dated 21 November 2017 the Respondent opposed the appeal arguing that the Judge referred to the Joint Presidential Guidance and the vulnerability of the Appellant before considering his credibility and the evidence as a whole.

Background

4. The history of this appeal is detailed above. The facts, not challenged, are that the Appellant is a citizen of Ethiopia of Oromo ethnicity born on 16 January 1999. He left Ethiopia in 2014 travelling via Sudan, Libya, Italy and France before arriving in the United Kingdom on 30 July 2015 and claiming asylum on arrival. He was 15 years old when he left Ethiopia and 16 on his arrival in the United Kingdom. The basis of his claim was that he faced persecution as a supporter of the OLF having been detained following a demonstration in April 2014 and only released in June 2014 following the payment of a bribe. He had also taken part in sur place activities in the United Kingdom. The respondent rejected his account of support for the OLF, attendance at the demonstration and detention afterwards and his sur place activities in the United Kingdom.

Submissions

5. At the hearing before me Mr Richards appeared to represent the Secretary of State and Mr Clarke represented the Appellant. Mr Clark said that the Judge accepted that the Appellant was a vulnerable witness and having done so had three duties. The first was to consider the Joint Presidential Guidance, the second was to consider the impact of the diagnosis of mental health issues and the Appellant’s consequent vulnerability on his behaviour and his evidence including inconsistencies and late disclosure and the third was to consider the extent to which the diagnosis corroborated his claimed ill treatment. The Judge had attended only to the first of these duties. Turning to the grounds of appeal Mr Clark said that grounds one and two stand together. Referring

to ground two the Judge said at paragraph 39 that he could not attach

“... any great weight as support for the Appellant’s account”

to the psychiatrist’s report but he does not go on to say how much weight, if any at all, he has attached. The question the Judge should have asked is whether there is a real risk that the Appellant has PTSD and if so the effect this had on the manner in which he gave his evidence and it’s potential as corroboration of his account. The expert takes into account the cause of the Appellant’s depressive disorder but diagnoses depression and PTSD, these are different mental health issues and reasons are given in the report. The report takes into account subjective behaviour, it is not just self-reporting. The Judge goes behind the expert’s report, this is wrong, the Judge is not a psychiatric expert.

6. Mr Clark did not expand on ground three. So far as ground four is concerned Mr Clark referred to the background information about surveillance and monitoring of telephone calls. This material was before the Judge.
7. For the Respondent Mr Richards said that as he read the decision the Judge rejected the expert’s assessment of the Appellant’s mental condition. He says at paragraph 10 that in the light of the expert evidence he has treated the Appellant as a vulnerable witness for the purpose of the hearing. Where he takes issue is at paragraph 42 where he says,

“... his conclusions are undermined by his failure to address the possibility that any mental health issues the Appellant might have could have their roots in the appellant’s separation from his family and home culture, as well as any arduous journey to get to the UK and the ongoing uncertainty as to his status”.

He is not rejecting the conclusion, he does not say that he does not accept the conclusion. The findings at paragraph 21 onwards shows that the Judge has taken account of the Appellant’s vulnerability. The Judge then comes to conclusions that are open to him. So far as grounds three and four are concerned the Judge gives sound reasoning and ground four is no more than a disagreement with his findings.

8. I gave an oral decision announcing that the appeal would be allowed, and I now give my written reasons.

Decision

9. The appeal was originally listed for hearing on 12 April 2017 but was adjourned so that an expert's report could be obtained on the Appellant's mental health and at the hearing on 2 June 2017 a report from Consultant Psychiatrist Dr Buttan was adduced. In the light of this report the Judge records (at paragraph 10) that *"the Appellant was treated as a vulnerable witness for the purposes of the appeal hearing"* and that *"The Joint Presidential Guidance Note No 2 of 2010 was applied throughout"*. The credibility of the Appellant's account was a prime issue at the hearing as this was the basis of the Respondent's refusal of the Appellant's claim. If the Appellant's account was accepted he would be at risk following the authority of MB (OLF and MTA – Risk) Ethiopia CG [2007] UKAIT 00030.
10. Dr Buttan's report is of fundamental importance to this appeal and the treatment of this report and the consequent treatment of the Appellant's evidence is the basis of the grounds of appeal and the submissions made by Mr Clark.
11. The starting point is that the Judge noted the report and self-directed to the Joint Presidential Guidance and records that the Appellant was treated as a vulnerable witness for the purposes of the appeal hearing. As Mr Clark accepted the Judge has completed the first of his duties.
12. However, the Judge does not go on to record the effect that treatment of the Appellant as a vulnerable witness had on the conduct of the hearing. The decision records that the Appellant gave evidence in chief, was cross examined and re-examined and that the Judge also asked a few questions (paragraph 16). More importantly the Judge does not go on to record the effect of that treatment of the Appellant as a vulnerable witness on his assessment of the Appellant's evidence.
13. The Joint Presidential Guidance at paragraph 10 gives guidance on the conduct of the hearing including (at 10.3) the assessment of evidence

'The order and manner in which evidence is given may be affected by mental, psychological or emotional trauma or disability

Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.

The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the

appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind.'

The recent decision in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123 provides at paragraph 31

"The PD and the Guidance Note [Guidance] provide detailed guidance on the approach to be adopted by the tribunal to an incapacitated or vulnerable person. I agree with the Lord Chancellor's submission that there are five key features:

- a. the early identification of issues of vulnerability is encouraged, if possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);*
- b. a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that "the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so" (PD [2] and Guidance [8] and [9]);*
- c. where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD [6] and [7] and Guidance [10]);*
- d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and*
- e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27])."*

14. The decision does none of this. At paragraph 28 the Judge rejects the Appellant's account of his reasons for leaving Ethiopia and gives his reasoning at paragraph 30 onwards. In summary the Judge finds that the development of the Appellant's account undermines his credibility. In his witness statement he said that he was detained and kept in terrible conditions, at interview he added that he was immersed in cold water when questioned, in his next witness statement he said that he was beaten and at his interview with Dr Buttan he adds that he was tortured. The Judge finds that this is a trend of more and more serious allegations being made.

15. At paragraph 32 the Judge records the Appellant saying that he had spoken to his family yet in the account recorded by Dr Button he says that he has not spoken to them since he left Ethiopia. It is noted that this is also inconsistent with the account given by his foster carer Mr Campbell.
16. In my judgment it is possible, that if the Judge had considered the Presidential Guidance, rather than merely referring to it, he would have considered whether the order and manner in which the Appellant gave his evidence were affected by his vulnerability. Not only was there Dr Buttan's report but also the Appellant was giving evidence of events that, if they occurred, occurred when he was a 14-year-old child and giving evidence of those events when he was still a child and the Judge was assessing the evidence given then against his recollection of events occurring when he was a child as an adult.
17. At the outset of the hearing (paragraph 10) the Judge accepts the vulnerability of the Appellant *"for the purposes of the hearing"* but in contrast at paragraph 42 the Judge finds that Dr Buttan's *"... conclusions are undermined by his failure to address the possibility that any mental health issues the Appellant might have could have their roots in the Appellant's separation from his family and home culture as well as any arduous journey to get to the United Kingdom and the ongoing uncertainty as to his status"*.

The Judge does not explain what he means by the conclusions being *"undermined"* but I can see little other potential explanation than that his conclusions are rejected particularly with the reference *"any mental health issues the Appellant might have"*. If this is the case then the judge, having accepted that the Appellant is a vulnerable witness for the purposes of the hearing on the basis of Dr Buttan's report has gone on to reject the conclusions of that report and therefore having accepted that the Appellant is a vulnerable person for the purpose of the hearing has not accepted that he is a vulnerable person for the consideration of his evidence. In my judgment there can be no other explanation and indeed this explanation is borne out by the failure of the Judge to factor vulnerability in to the consideration of the evidence.

18. Expert's reports should only be rejected when there are clear and cogent reasons for doing so. In my judgment the reason given by the Judge, that the expert has not considered alternative reasons for the Appellant's mental state are neither clear not cogent for to consider alternative reasons there must be acceptance that the mental state exists. Further it is clear that the expert's report

does consider alternatives (at paragraph 3, page 21) and in doing so separates the two mental health conditions diagnosed, PTSD and depression. The conclusion rejected seems to be the acceptance of the Appellant's credibility by the expert and the diagnoses of PTSD and depression.

19. In my judgement the Judge has fallen into error in two material ways. Firstly, by not taking account of the Presidential Guidance in his consideration and assessment of the evidence of the Appellant who was a vulnerable witness both in terms of his age when the events claimed to have happened occurred, his age when initially giving his evidence of those events and his mental health throughout. Secondly by rejecting the expert's report without giving adequate and cogent reasons for doing so.

Summary

20. The decision of the First-tier Tribunal involved the making of a material error of law. I allow the Appellant's appeal.
21. The error of law identified goes to the heart of the credibility finding made and, in these circumstances, I remit the matter to the First-tier Tribunal for hearing de novo.

Signed:

Date: 6 March 2018

A handwritten signature in black ink, appearing to read 'J F W Phillips', written in a cursive style.

**J F W Phillips
Deputy Judge of the Upper Tribunal**