



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

Appeal Number: PA/03072/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 2 October 2019**

**Decision & Reasons Promulgated
On 15 October 2019**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

**A N E
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C Zapata Besso, Counsel, instructed by Duncan Lewis & Co Solicitors

For the Respondent: Miss R. Bassi, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Eldridge ('the Judge') sent to the parties on 24 July 2019 by which the appellant's appeal against the decision of the respondent to refuse to grant him international protection was dismissed.
2. Designated Judge of the First-tier Tribunal Macdonald granted permission on all grounds.

Anonymity

3. The judge issued an anonymity direction. No application was made by the representatives before me to set aside this order. I therefore confirm the direction.

Background

4. The appellant is a national of Afghanistan and is presently aged 22. Having been born in Afghanistan the appellant accompanied his family to Pakistan at the age of 2 and he resided in that country for several years before returning to Afghanistan in 2009 with members of his family. A year later he relocated to Kabul where he resided with his mother, younger brother and five sisters. His father resided in the United Kingdom and is now a British citizen.
5. On or around 11 June 2014, when aged 17, the appellant was approached by a masked man whilst travelling to school. The man attempted to place a handkerchief over the appellant's mouth and nose, but the appellant managed to struggle free and went to a neighbour's house. The police were called. Though his statement was taken the police did not follow up the incident.
6. The appellant arrived in this country in April 2015 and claimed asylum upon arrival. He asserted that the attempted kidnapping had been for ransom because his family lived in a big house in a wealthy area of Kabul. The respondent refused his application for international protection and his appeal was subsequently dismissed by the First-tier Tribunal. In his decision of 16 November 2015 JFtT Mitchell found the appellant to be credible but noted that the attempted kidnapping had occurred some several years previously and there had been no further attempts at kidnapping members of the appellant's family. Consequently, the appellant's claim to be at real risk of suffering serious harm at the hands of an unknown kidnapper or kidnappers was simply not made out to the low standard required in refugee claims.
7. The appellant submitted further representations in July 2018 which were accepted by the respondent to constitute a fresh claim for the purposes of paragraph 353 of the Immigration Rules. The respondent refused the application by way of a decision dated 22 February 2019 and the appellant enjoyed a right of appeal.
8. The appellant contends that further to his original claim for international protection he is also at risk of persecution and serious ill-treatment because of a relationship he had outside of marriage with the daughter of General Jurat, a military officer formerly connected to Ahmad Shah

Masoud, who held several high-level positions in Afghanistan including that of Deputy of Minister of Tribal Affairs and Border Affairs. Up and until September 2018 General Jurat was a senior Presidential advisor and was Deputy of the National Security Council. It is the appellant's case that he believes that the General was behind the attempt to kidnap him. He states by way of his fresh claim that he had not previously been 100% sure that General Jurat was behind the kidnapping until he was notified as to the true circumstances by a friend called Najeeb in late 2015. He further states that General Jurat's sons approached Najeeb and asked him about the appellant's whereabouts. An argument ensued which escalated into a physical fight and one of Najeeb's bodyguards shot one of General Jurat's sons dead. Najeeb then fled to India where he claimed asylum. It is appropriate to observe that the underlying reason for the purported adverse interest in the appellant is that General Jurat's daughter became pregnant consequent to their relationship.

Hearing before the FtT

9. The appeal came before the Judge sitting at Hatton Cross on 12 July 2019. The Judge noted the previous positive credibility findings made by JFTT Mitchell as to the attempted kidnapping. He proceeded to consider the evidence and found to the lower standard that the appellant had not been in a sexual relationship with the daughter of General Jurat and that he was not being truthful as to his being of adverse and persecutory interest of a person in a position of power.
10. At [59] of the decision and reasons the Judge detailed:

‘The appellant has faced one incident in Afghanistan of what appears to be an attempted kidnap. That may have been for any one of a number of reasons, but I am not satisfied, even to the lower standard, that it had anything to do with General Jurat and his family. There is no logical reason given why his family are said to have fled from their former home. None of them has been the subject of any adverse interest. Additionally, the uncles who built the fine house in an apparently prosperous part of Kabul have remained untouched. I do not accept that this former home is no longer occupied by the family or available to them.’
11. The Judge further found as to the appellant's health concerns at [66] that he could return to Afghanistan and be supported by a network of people including his siblings. He would be able to access accommodation as well as emotional, moral and practical support. The appeal was dismissed on both international protection and human rights grounds.

Grounds of Appeal

12. Grounds of appeal were drafted by Miss Zapata Besso who represented the appellant before the Judge. Five grounds of appeal are identified; the

last ground being subdivided into two separate challenges. It is submitted that the Judge:

- (i) failed to consider whether the appellant would now be at risk on the basis of his previously accepted account;
- (ii) failed to correctly apply the guidance on child, vulnerable adult and sensitive witnesses and also to consider mitigating factors made on behalf of the appellant. This is said to have resulted in procedural unfairness;
- (iii) failed to assess the appellant's credibility "in the round" with reference to the medical evidence;
- (iv) adopted an erroneous approach to credibility by reference to inherent implausibility; and
- (v) placed erroneous reliance upon unsafe country guidance case law and further failed to apply the correct test for departing from country guidance case law.

13. As to ground 5 this was developed during the course of the hearing to incorporate a challenge to the Judge's consideration of the medical evidence which Miss. Zapata Besso asserted strongly supported the appellant's evidence that if returned to Afghanistan he would live a self-contained life within the family home and would not seek support. At the hearing Miss Zapata Besso further addressed me upon Article 15(c) of the Qualification Directive in light of the appellant's mental health vulnerabilities and I was referred to the judgment of the CJEU in C-465/07 Elgafaji v Staatssecretaris van Justitie EU:C:2009:94; [2009] 1 W.L.R. 2100.

14. In granting permission to appeal to this Tribunal on 29 August 2019 DJFtT Macdonald observed:

'The grounds of application are numerous: it is said there was a failure to consider whether the appellant would be at risk now on the basis of his previously accepted account, that he failed to correctly apply the Joint Presidential Guidance on vulnerable witnesses, that he failed to assess the appellant's credibility in the round and applied erroneous reliance on unsafe country guidance caselaw.

While the Judge gave reasons for rejecting the appellant's account including that there were inconsistencies and implausibilities (paragraph 58 of the decision) there is arguable merit in the grounds for the reasons stated. Permission to appeal is granted on all grounds.'

15. No Rule 24 response was filed by the respondent.

Decision on Error of Law

16. The primary issue addressed before this Tribunal concerned ground 2, and in particular [2], [11], [12] and [13] of the grounds:

'The appellant is a former UASC, originally from Kabul in Afghanistan. He was born on 1 January 1997 and is currently 22 years old. The appellant's fresh asylum/protection claim, dated 4 July 2018, is founded on his risk of persecution/serious harm, including honour killing, on account of his identity as an adulterer, based on the pre-marital relationship he had with a girl named Sadaf, who was the daughter of a powerful warlord named General Jurat. It was also claimed his return to Afghanistan would breach Articles 2, 3 and/or 8 of the ECHR.

...

The Judge fails to consider the effect of the appellant's vulnerabilities on his ability to disclose. The Judge states that the appellant's *'disclosure of this account is not a matter, in my judgment, in which the appellant's current mental health plays any significant factor'* because the psychiatric experts do not comment on it [49]. This is wrong. Dr Burman-Roy recognises that the appellant suffers *'significant guilt and self-blame for having a relationship that has resulted in so much trauma for himself and his family'* [...] This is clearly relevant to his reticence to disclose that relationship.

The appellant's account is that, in late 2015, his friend Najeeb relayed the death of General Jurat's son to him on the telephone, which had happened a *'couple of weeks beforehand'*. The appellant provided a press report in respect of the death [...], which stated that General Jurat's son had been killed in Kabul on 1 January 2015. At [53], the Judge finds that *'these very different dates cannot be reconciled. [...] I do not find any mental health difficulties will have contributed to a mistake of this nature.'* In saying so, the Judge entirely fails to mention or consider Dr Burman Roy's explicit advice that the appellant's PTSD may lead to conflicting accounts.

The appellant's written and live evidence, as well as his father's live evidence, was that the appellant had informed his father about his relationship with General Jurat's daughter in 2017. The Judge places an unlawful reliance on an apparent inconsistency present in Dr Burman-Roy's summary of his interview with the appellant, where the appellant is recorded as having said that he told his father about the relationship around 18 months after arriving in the UK (which would have been in April 2016) [53]. He fails to take into account the fact that Dr Burman-Roy's summary is not a formal record of evidence. The appellant was never given an opportunity to read through it or sign it as true. The inconsistency was not put to the appellant in cross-examination, so the appellant was never given an opportunity to respond to it. This is procedurally unfair. Again, the Judge fails to take (sic) consider the effect of vulnerabilities on cogent memory.'

17. Considerable forensic analysis was undertaken before me by Miss. Zapata Besso and Miss. Bassi upon two paragraphs of the Judge's decision, namely [49] and [53]:

'The disclosure of this account is not a matter, in my judgement, in which the appellant's current mental health pays any significant factor. I note that the report from Dr Bose, the consultant psychiatrist, does not seek to comment on this aspect [...] I have also considered the report of Dr Soumitra Burman-Roy [...] and nothing in that report leads me to conclude otherwise on this issue.'

...

'The appellant relies upon the account of the death of the General's son and this being related to him by Najeeb in late 2015 and how this had happened 'a couple of weeks beforehand' (paragraph 24 of his witness statement of April 2018). He actually relies, however, on a press report in respect of the death of the son and this may be seen at page B474 of the appellant's bundle. That report is of a son of the General being killed in Kabul, but the report is dated 1 January 2015. **These very different dates cannot be reconciled. In my judgement these are really important issues in the life of the appellant if his account is true and I do not find any mental health difficulties will have contributed to a mistake of this nature.** Rather, I conclude that what has happened is that it has been convenient for the appellant to relate a conversation in late 2015 rather than have to explain in greater detail why a matter about which he was now certain had not been raised in his appeal that year. I also note in this context that is apparent from the report from Dr Burman-Roy that the appellant told him that he had informed his father of the relationship with Sadaf about 18 months after he came into the United Kingdom. That would have been in about April 2016, where he now says it was during 2017. He has not given a consistent or credible account, even taking note of his health issues.'

(Emphasis added in bold type)

18. It is apparent from reading the decision that the Judge endeavoured to take great care in considering the evidence before him and in detailing his considered reasons. However, the two sections of the paragraphs detailed above in bold are of concern. As to [49] it is not the current status of the appellant's mental health that is to be considered as to late disclosure, but his state of mind at the time he made and pursued his first asylum claim. As observed by Dr Bose in a psychiatric report dated 10 November 2017 the appellant suffers from severe PTSD and depression and the symptoms include recurrent involuntary and intrusive distressing memories of the attempted kidnapping that he experienced one week before he came to this country. In the medico-legal report of Dr Burman-Roy dated 13 April 2019 the diagnosis of PTSD and severe depression is again confirmed, although it is noted that over the course of eighteen months the symptoms have worsened with him now experiencing more depressive symptoms including some pseudo-psychotic phenomenon. The mental health conditions were therefore existing during the course of the previous asylum claim. It is difficult to identify any reasoning on behalf of the Judge as to why such mental health concerns could not play any role in the

delayed disclosure of the appellant's history. It may be that a Tribunal having considered the evidence and taken into account the medical evidence could reasonably conclude that the appellant's ability to be coherent and consistent on other matters undermines his delay in raising the issues concerning General Jurat, but it is not appropriate for a Judge to dismiss medical opinion as to the possible impact of mental health concerns upon disclosure out-of-hand with no explanation in circumstances where it would be reasonably open for a JFT to accept the appellant's explanation in light of such evidence. The Tribunal should always be mindful that it is not expert in medicine or psychiatry and must consider expert medical or psychiatric opinion with care.

19. I accept the submission of Miss Zapata Besso that this approach flows through into [53] where again, without more, the Judge simply asserts that having mental health difficulties could not explain a significant discrepancy as to the date the General's son was killed. Looking at the sentence. 'In my judgment these are really important issues in the life of the appellant if his account is true and I do not find any mental health difficulties will have contributed to a mistake of this nature' the words 'will have' attain importance. There is real concern that the adoption of such approach fails to engage with Dr Burman-Roy's opinion that the appellant may be suffering from memory loss and that his recall of events may vary consequent to his worsening mental health. The reasoning of the Judge precludes any express consideration of Dr Burman-Roy's opinion when assessing the impact of memory loss and recall in light of inconsistent presentation of evidence. This approach is materially erroneous in law and the findings made in those two paragraphs are sufficient to undermine what in many other respects is a carefully crafted decision and reasons. The failure to adequately consider relevant medical evidence on a core issue of discrepancy adversely affects the safety of this decision.
20. Having found for the appellant as to a material error of law having been identified by ground 2, I am not required to consider grounds 1 and 3 to 5. The identified material error of law arising from ground 2 is such that this decision must be set aside.

Remittal

21. As to remaking the decision, given the fundamental nature of the material error identified, I accept the submissions made by both Miss Zapata Besso and Miss Bassi that clear findings of fact will have to be made when this decision is remade. Both advocates submitted that the appeal should be remitted to the First-tier Tribunal if a material error of law was established. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal that reads as follows at paragraph 7.2:

'The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal'

22. I have reached the conclusion that it is appropriate to remit this matter to the First-tier Tribunal for a fresh decision on all matters. The appellant has enjoyed no adequate consideration of his asylum claim to date and has not yet had a fair hearing.

Notice of Decision

23. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the judge's decision promulgated on 24 July 2019 pursuant to Section 12(2)(a) of the Tribunal Courts and Enforcement Act 2007.
24. This matter is remitted to the First-tier Tribunal for a fresh hearing before any judge other than Judge of the First-tier Tribunal Eldridge.
25. No findings of fact are preserved.
26. The anonymity order is confirmed.

Signed: *D O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 11 October 2019