Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09098/2019

THE IMMIGRATION ACTS

Heard Remotely at Field House	**Decision & Reasons Promulgated**
On 18 March 2021	**On 10 August 2021**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

ZB
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms D Revill, Counsel instructed by Duncan Lewis Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make this order because the appellant is an asylum seeker and is entitled to protection.

2. This is an appeal by a citizen of Afghanistan against a decision of the First-tier Tribunal dismissing his appeal against a decision of the respondent on 10 September 2019 refusing his application for international protection. The decision to dismiss the appeal on Article 8 grounds was not challenged.

3. Permission to appeal was given by Upper Tribunal Judge Kamara on 22 July 2020. She said:

> "It is arguable that the judge erred in considering the expert report only after reaching adverse credibility findings, applying *Mibanga*. It is further arguable that the judge made findings as to the substance of the appellant's asylum claim without reference to the expert report which addressed those matters. Lastly, the judge's assessment of the medical evidence may arguably have been in error as well as the apparently inconsistent findings regarding the appellant's mental health".

4. There was a Rule 24 notice served by the respondent. This contends in summary outline for the purposes of introduction that the adverse credibility findings were open to the judge, that the judge handled the medical evidence lawfully and there is no material error.

5. I begin by looking carefully at the First-tier Tribunal Judge's decision.

6. The judge began by noting that the appellant's age had been in dispute. He entered the United Kingdom on 14 November 2009 and claimed asylum the same day. He said he was a minor but he was found to be an adult and his date of birth was assessed as 1 January 1991. He claimed asylum and the application was refused. He appealed unsuccessfully and was appeal rights exhausted on 22 March 2010.

7. He remained in the United Kingdom and was encountered on 8 October 2018 when he was found working without permission in the kitchen area of business premises. He was detained pending removal and on 24 October 2018 made further submissions. They were rejected on 14 December 2018 and he made still further representations on 20 June 2019 leading to the decision complained of.

8. The judge summarised the appellant's case. He said that he would risk persecution from his paternal uncle who wanted to kill him and from the Taliban particularly because he would be perceived as "westernised" because of the time he had spent in the United Kingdom. Additionally, he sought to remain on "Article 8" grounds.

9. The judge then summarised the respondent's case.

10. The respondent reminded herself that the appellant's age had already been determined against his claims, as was his fear of being killed by a paternal uncle. The respondent did not accept the appellant was at risk at all.

11. The respondent did not accept that conditions in Kabul were so bad that it was something from which he should be protected on humanitarian grounds. The respondent did not accept that the appellant was at any risk in Kabul from the Taliban and did not accept that if there was a risk it could not be addressed by effective protection from the authorities there.

12. The judge reminded herself of the decision in **Devaseelan [2002] UKIAT 702**. The judge then referred to a decision of Immigration Judge Alakija in AA 01474 2020 promulgated on 5 March 2020. The judge then directed herself to background evidence and particularly the country guidance case of **AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC)**.

13. Starting at paragraph 35 the judge set out her findings.

14. At paragraph 35 the judge directed herself that she had considered each item of evidence and reviewed the evidence "in the round". At paragraph 36 she repeated the claim to have looked at the evidence in the round having had regard to the background material. At paragraph 36 she was conspicuously careful, by referring to the decision in **HK v SSHD [2006] EWCA Civ 1037**, to reminder herself that the story as a whole had to be assessed against the available country evidence and expert evidence as well as its own internal consistency.

15. The judge then directed herself specifically to the medical report of Dr Michael Shortt dated 24 February 2020. Dr Shortt is a consultant forensic psychiatrist. The judge noted that the appellant suffered from flashbacks "of his negative experiences in Afghanistan". The expert concluded that the appellant was suffering from PTSD and a moderate depressive order.

16. I find paragraph 46 worthy of note and somewhat troubling. Dr Shortt had commented on the possibility of the appellant feigning his symptoms and concluded that this would be "difficult" without specific psychiatric or medical knowledge. The judge then said:

> "However, the expert has not made clear what psychiatric/medical knowledge would be required in order to feign a presentation of symptoms or whether this is readily available on the internet and there is no comment by the expert as to whether his overall presentation was not consistent with the appellant feigning his symptoms".

17. The judge found "no persuasive evidence" that the appellant had suffered any mental health symptoms including flashbacks until after his detention in the United Kingdom. The appellant had not made any claim about mental health symptoms in his first asylum claim and had not referred to any memory or recall problems in his first application. The judge found that the appellant was fit enough to have obtained work irregularly in the United Kingdom and commented on the strain he would have experienced in the United Kingdom. The judge acknowledged that the appellant may have "minor mental health symptoms for which he is being prescribed a standard antidepressant" but the judge was not persuaded that he was suffering from PTSD or depression as a result of experiences in Afghanistan. The judge again said she did not accept it as credible that he would not have mentioned being attacked by people with knives when interviewed earlier if such a thing had happened.

18. The judge did not find the appellant's supporting witness particularly helpful. Although they had known each other for some time he claimed to have only supported the appellant since his release from detention in 2019. The judge did not accept the appellant was "genuine in his report of mental health symptoms".

19. The judge found nothing in the expert report that upset the conclusions reached by Judge Alakija. The judge found the appellant "not a credible person". The appellant had been found to have lied about his age and the judge found no new evidence that improved his case. At paragraph 55 (paragraph 54) the judge said:

> "Overall I am satisfied that there is no new persuasive evidence relied upon by the appellant relating to his claim for asylum and I find that the previous findings of fact are to be used as my starting point and applied in my determination of this appeal".

20. The judge then purported to apply them. The judge did not accept the appellant's account. The judge did not believe his alleged problems with his paternal uncle or that his father was killed by the Taliban or that the Taliban presented any problems in the future for the appellant in the event of his return. The judge did not believe the appellant came from Kapisa but found that the appellant came from Kabul. The judge did not accept the appellant would be at any kind of risk in the event of his return.

21. The judge acknowledged the expert report of Dr Giustozzi dated 19 February 2020 and found the report substantially dependent on the appellant being credible and the judge did not believe the appellant.

22. In her first ground Ms Revill criticises the judge's approach to the expert report.

23. She notes that Dr Antonio Giustozzi opined that the account of the land dispute with the paternal uncle was "perfectly plausible". Indeed, amongst Pashtuns such a dispute "often occurs". Her point is that this *is* a reason to depart from the earlier findings and the judge has not dealt with it. The judge has not entirely ignored the report on this aspect. It is mentioned in passing at paragraph 64 which begins by the judge saying that overall she does not accept the appellant's account of the problems with his paternal uncle or other things. She goes on to say:

> "Whilst I note that kin conflict is a typical feature of the Pashtun countryside, especially amongst cousins, as set out in the country expert report, I find that the appellant's account regarding his conflict from his paternal uncle is fabricated and that he has not proved to the lower standard of proof that a genuine conflict exists or that he is at any genuine risk on return to his home area".

24. The judge drew attention to well-known observations of Wilson J (as he then was) in **Mibanga v SSHD [2005] EWCA Civ 367** and particularly the part at paragraph 24 that she emphasised:

> "What the fact-finder does at his peril is to reach a conclusion by reference only to the appellant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence".

25. Ms Revill contended that this is precisely the error committed by the First-tier Judge in this case.

26. The second ground again criticises the judge's approach to Dr Giustozzi's report. The judge rejected the appellant's claim that his paternal uncle had taken his land from him on the basis that "it is not credible that another male member of the family would not have taken steps to ... assist him". According to the grounds the difficulty is that Dr Giustozzi regarded land grabbing as a "major issue" in Afghanistan and trying to reclaim the land can be "very dangerous". The grounds contended, in effect, that the judge's speculation about somebody rushing to assist the appellant was contrary to the expert evidence.

27. The third ground complains about the treatment of the report of the consultant forensic psychiatrist. The grounds particularly criticise the judge for commenting on the absence of medical evidence at a time when the appellant was not entitled to national health care. It was never his case that suffering from PTSD and depression stopped him working. The judge gave no proper reason for rejecting Dr Shortt's conclusion that the appellant suffered from PTSD which was likely to worsen on removal (AB2 p13) but the judge found that he did not have serious mental health difficulties.

28. The fourth ground says the judge has made inconsistent findings about the appellant's mental health. At paragraph 48 she accepted that he had mental problems because the judge said that the appellant "may well now have some minor mental health symptoms for which he has been prescribed a standard antidepressant" but then goes on to say that she is "not persuaded that he has genuine mental health symptoms and finds that he has feigned symptoms in order to bolster his appeal".

29. These two positions are said to be contradictory. If the judge accepts the appellant has mental health problems that would impact on how he could manage in Kabul and that should have been factored in.

30. Before me Ms Revill relied on her skeleton argument of 3 March 2021. This is, appropriately, based closely on her grounds of appeal to the Upper Tribunal. There Ms Revill reasserts that the First-tier Tribunal's approach to the evidence of Dr Giustozzi was fundamentally wrong.

31. Ms Revill accepted that the Rule 24 notice was correct to draw attention to the judge referring to the report but, she said, the decision showed no consideration of it. The point that would not go away was that the very contention that the judge had rejected had been described as plausible by the expert and no proper reason given for not following his opinion.

32. This is echoed in the development of the second ground where Ms Revill repeats that Dr Giustozzi regarded land grabbing as a major issue in Afghanistan and that it can be "very dangerous and can be lethal to try to reclaim land". This assertion is clearly against the judge's apparent finding that it was incredible that nobody stuck up for the appellant when the uncle tried to take the land and, Ms Revill suggested, made it credible that even if the uncle was not involved somebody would have taken the land by now. The problem is that the judge has not considered these points in her decision.

33. Ground 3 deals with the treatment of the medical report. The judge found that the appellant does not have serious mental health difficulties and that Dr Shortt was wrong to diagnosed PTSD which condition was expected to deteriorate further. The reasons given for rejecting the diagnosis appear to be that the appellant was not registered with a general medical practitioner for ten years and did not mention his symptoms of mental ill health on an earlier occasion and was able to work but it is not clear why these things should be seen as so important. Plainly it is at least possible that the absence of further medical evidence was connected with the absence of access to medical treatment.

34. This is not in any way to commend the appellant for living in the United Kingdom without permission but it is hard to criticise him for not producing medical evidence at a time when he had no money or access to medical care. It is not clear what was said on earlier occasions but even if the judge is right that the claim was not made earlier it is hard to see why that undermines Dr Shortt's opinion.

35. In amplification of ground 4 it is said the judge was inconsistent in finding that the appellant "may well now have some minor medical health problems" but also finding that she is not persuaded they are not feigned. It was Ms Revill's case that if the appellant does have mental health problems that affects return to Kabul and it is not clear what the judge found.

36. Mr Melvin relied on the Rule 24 response drawn by Ms J Isherwood who is also a Senior Home Office Presenting Officer. Additionally, he particularly asked me to look at Dr Giustozzi's report which, he submitted, was not as helpful as the appellant said.

37. Dr Antonio Giustozzi's report is dated 19 February 2020. Much of the report is certainly generic although that does not prevent it being useful. However, starting at paragraph 22, there is an assessment of the risk from the uncle and the plausibility of the claim exactly as set out in the grounds and skeleton argument. I do not share Mr Melvin's professed confidence that it could not have made any difference. I agree with Ms Revill that considering the report is a necessary part of the fact-finding exercise. It needs to be evaluated properly.

38. I similarly reject Mr Melvin's arguments concerning the medical report. Whilst it is right that it is for the judge to evaluate the evidence I do not understand what point is being made when it is said there is no support in the general medical practitioners' reports. I also agree with Ms Revill that it is not clear what degree of illness, if any, the judge has accepted.

39. It is perfectly obvious to me that the judge has considered the necessary documents. Not only is this claim made but reference is made to the contents and, although I do not put much weight on this because I cannot be sure it is the judge's work, certain parts on my copies of the documents have been highlighted suggesting that the judge had them very much in mind.

40. I cannot get round Ms Revill's insistence that mere reference to documents is not the same as showing proper consideration. It may be that the judge has carried out the necessary mental exercises but they are not reflected in the decision and I am driven to the conclusion that this decision is unsound and I set it aside.

41. I also agree with Ms Revill that the deficiency goes to the very root of the matter and the appeal needs to be redetermined in the First-tier Tribunal and I so direct.

42. Notice of Decision

43. The First-tier Tribunal erred in law. I set aside its decision and direct that the appeal be redetermined in the First-tier Tribunal.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 5 August 2021