Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09610/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 May 2021	On 22 June 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

BN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant:	Mr Bandegani, Counsel instructed by Duncan Lewis & Co
For the Respondent:	Ms Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which both parties have consented. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

Background

2. The appellant is a citizen of Afghanistan born on 1 January 1992. He entered the UK in 2006 and applied for asylum in 2007.

3. The appellant's claim, in summary, is that faces a risk of persecution or serious harm in Afghanistan because of a land dispute involving his family in which his father was killed. The claimed land dispute is in Parwan Province, which is the appellant's home area. He claims that his cousins intend to kill him in order to prevent him from avenging his father's death. He also claims to be at risk because of (a) the deteriorating security situation in Afghanistan; (b) being perceived as westernised; and (c) his health and suicide risk.

4. The appellant's asylum application in 2007 was refused but he was granted discretionary leave as a minor until June 2009.

5. In June 2010 a further asylum application was refused and the appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Nightingale ("the previous judge"). In a decision promulgated on 31 January 2011, the previous judge dismissed his appeal. Despite making allowances for the appellant's age, the previous judge found the appellant's account of events in Afghanistan to be vague and lacking any of the detail to be expected of a credible account. The previous judge also found several parts of the claim to be "wholly inexplicable" and "wholly incredible".

6. The appellant subsequently made further submissions, which were refused. He then appealed, for a second time, to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Louveaux ("the judge"). In a decision promulgated on 11 February 2020, the judge dismissed the appellant's appeal. The appellant is now appealing against this decision.

Decision of the First-tier Tribunal

7. The judge stated that, having reviewed the previous judge's "specific credibility findings" she could "find no fault with her reasoning". She also stated that, having given anxious scrutiny to the evidence submitted by the appellant, there was no basis to depart from the previous judge's credibility findings.

8. The appellant adduced two reports by an expert on Afghanistan, Dr Giustozzi. The judge found that the reports of Dr Guistozzi were cogent evidence that land disputes of the kind described by the appellant occur in Afghanistan, but that they did not address the multiple points on which the previous judge found the appellant's account of being the victim of such a dispute to be implausible.

9. The appellant also relied upon a witness statement from his uncle, who attended the hearing but did not give evidence. The judge stated that she did not draw an adverse inference from the appellant's uncle not giving oral evidence, but that in the absence of oral evidence that was properly subjected to scrutiny she could give little weight to the evidence. The judge also found that the uncle's witness statement only addressed one of the many reasons given by the previous judge for finding the appellant's account not credible.

10. The appellant adduced a report by a consultant psychiatrist, Dr Buttan. Dr Buttan expressed the opinion that the appellant suffers from adjustment disorder and moderate depression and that he has a moderately high risk of suicide and self-harm. Dr Buttan stated in his report that the appellant was not displaying exaggerated responses and it was his opinion that he was not exaggerating or feigning his conditions. At paragraph 21(iv) the judge stated:

> "Clearly the appellant was able to persuade Dr Buttan that he was telling the truth in respect of his asylum claim. Given Dr Buttan's professional expertise, I do not set that aside lightly. However, when considered against the clear and multiple credibility findings by [the previous judge], I do not find the appellant's ability to convince Dr Buttan is capable of undermining her findings, even when considered in the light of all the other evidence in this case."

11. With respect to family support in Afghanistan, the judge rejected the appellant's claim that his mother and two of his brothers now live in the border region between Afghanistan and Pakistan. The judge noted that it was the appellant's case that they lived in the border region, rather than in Pakistan, because they lack the requisite refugee card and face arrest by Pakistani security forces. At paragraph 40(ii) the judge stated that the appellant's representative submitted that the Pakistani residence documents of the appellant's mother and brothers had been provided to the respondent and their authenticity had not been challenged. The judge stated that the documents were not before her and therefore she could not make a finding as to the location of the appellant's mother and two brothers. She also stated that if the appellant's mother and brothers have Pakistani documents that would appear to contradict the appellant's claim that they live in the border region because of lack of permission to reside in Pakistan. The judge also found, at paragraph 40(iii), that the appellant's account of how his mother had been located, after having lost contact with her, was implausible.

12. The judge rejected the appellant's "westernisation" argument, finding that the treatment the appellant would suffer on account of his westernisation would not amount to persecution.

13. With respect to the appellant's mental health, the judge stated at paragraph 27 that she gave Dr Buttan's report considerable weight but that the report was of limited relevance because Dr Buttan relied on the appellant's account, which was not credible. The judge stated that she accepted that the appellant suffers from moderate depression but not that he is at moderately high risk of suicide and self-harm if returned to Afghanistan. The judge explained at paragraph 28 that the reason this was not accepted was that Dr Buttan's assessment of suicide risk in Afghanistan was predicated on an acceptance that the appellant's asylum claim was genuine.

14. The judge found that it would not be unduly harsh for the appellant to relocate to Kabul because (a) the evidence adduced by the appellant did not justify a departure from extant country guidance case law on the level of indiscriminate violence not reaching the Article 15(c) threshold; (b) the appellant would have family support in Afghanistan; (c) he will receive financial support from his brother in the UK, who currently gives him £30 a week; (d) his mental health problems would not prevent him working or taking care of himself; and (e) he grew up in Afghanistan and speaks Pashto.

15. The judge found that the appellant's removal would not breach article 8 ECHR as there were not very significant obstacles to his integration in Afghanistan and his private life in the UK should be given only little weight as it was established when his immigration status was precarious.

Grounds of Appeal

16. The appellant advanced four grounds of appeal, under the headings: irrationality, procedural unfairness, failure to apply the law in respect of the protection claim, and failure to apply the law in respect of the article 8 claim. However, within the irrationality ground there are several distinct arguments and I have found it convenient to divide the appellant's arguments into eight separate grounds. I have set them out below, and will refer to these eight grounds in the remainder of the decision.

17. **Ground 1:** the judge erred by not considering Dr Giustozzi's evidence as an integral part of the assessment of the appellant's credibility.

18. **Ground 2:** the judge erred by treating the evidence of the appellant's uncle as "not impartial". It is also argued that the reasoning was inconsistent, as the judge stated that she did not draw an adverse inference from the uncle not giving oral evidence but then gave a his evidence only little weight because he did not give oral evidence.

19. **Ground 3:** the judge misapplied *Deevaselan* by treating the decision of the previous judge as a legal straitjacket and by effectively ruling out the possibility of departing from the findings of the previous judge.

20. **Ground 4:** the judge's approach to Dr Buttan's report was inconsistent as in paragraph 22(iv) the judge stated that his opinion should be "set aside" but later in paragraph 27 she gave the report "considerable weight". It is also argued that a cogent reason based on evidence was not given for rejecting Dr Button's expert opinion, with reliance placed on *JL (medical reports-credibility) China* [2013] UKUT 00145 (IAC), the headnote to which states:

> (4) For their part, judges should be aware that, whilst the overall assessment of credibility is for them, medical reports may well involve assessments of the compatibility of the appellant's account with physical marks or symptoms, or mental condition: (SA (Somalia) [2006] EWCA Civ 1302). If the position were otherwise, the central tenets of the Istanbul Protocol would be misconceived, whenever there was a dispute about claimed causation of scars, and judges could not apply its guidance, contrary to what they are enjoined to do by SA (Somalia). Even where medical experts rely heavily on the account given by the person concerned, that does not mean their reports lack or lose their status as independent evidence, although it may reduce very considerably the weight that can be attached to them.

It is also submitted that the judge failed to explain why the report was not relevant to the global assessment of the evidence.

21. **Ground 5:** it was speculative for the judge to find that the appellant would have family support on return to Afghanistan, as the finding was not based on any evidence.

22. **Ground 6:** the judge's assessment of relocation to Kabul was unsafe because reliance was placed on a country guidance case that was subsequently set aside: *AS (Safety of Kabul) Afghanistan CG* [2018] UKUT 118 (IAC).

23. **Ground 7:** it was procedurally unfair for the judge to draw an adverse inference from the appellant not producing his mother and brothers ID cards at the hearing when these documents were submitted to the respondent, who failed to produce them despite being requested to do so by the appellant's solicitors.

24. **Ground 8:** the judge erred, when assessing whether there would be very significant obstacles to integration under article 8, by simply carrying over the findings made in respect of internal relocation and not undertaking an assessment that was consistent with *Secretary of*

State for the Home Department v Kamara [2016] EWCA Civ 813, where it is stated:

> In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

Analysis

25. I reserved my decision after hearing submissions from Mr Bandegani, on behalf of the appellant, and Ms Cunha, on behalf of the respondent.

26. The appellant claims to be at risk because of a land dispute. This claim was considered in detail by the previous judge, who gave several reasons for finding the appellant's account implausible. The key findings on credibility/plausibility are in paragraphs 51-52 of the previous judge's decision where, inter alia, the previous judge found it implausible that:

    a. the appellant was able to hide in a three bedroom house for two years when men intent on finding him came to it regularly;

    b. the appellant's mother remained in the house where she was subjected to regular visits and physical assaults given that she had sufficient resources to support her family and had relatives in another province the men were unaware of;

    c. the men intent on finding the appellant could have easily followed his mother to the relatives house in the four years that she travelled to visit him there; and

    d. the appellant's mother brought the appellant secretly to the family house for visits.

27. In accordance with the guidelines set out in *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 702, although the judge was not bound by the previous decision, she was required to treat it as

her starting point. Moreover, as explained in paragraphs 37 and 41 of *Devaseelan*, it was not the judge's role to consider arguments intended to undermine the previous judge's decision.

28. The judge therefore was required to take as her starting point that the appellant's account of a land dispute was rejected as implausible by the previous judge and consider whether there was any evidence that was not before the previous judge which justified reaching a different conclusion. Mr Bandegani argued that there was such evidence, in the form of the reports by Dr Giustozzi. He submitted that Dr Giustozzi's view that the appellant's account was plausible needed to be an integral part of the credibility assessment and could not be brushed aside.

29. The difficulty with Mr Bandegani's argument is that Dr Giustozzi's reports do not address any of the reasons given by the previous judge for finding the appellant's account implausible. If the previous judge had rejected the appellant's account because she did not accept that land disputes of the type the appellant described occurred in Afghanistan then Dr Giustozzi's evidence, which shows that such disputes do occur, would have undermined the previous judge's findings and justified reaching a different conclusion. However, the previous judge did not find it implausible that a land dispute occurred; rather, she found particular aspects of the appellant's account (as set out above in paragraph 26) to be implausible. Dr Giustozzi's report does not address any of these points. The judge therefore was correct – and did not fall into error - by finding at paragraph 21(i) that Dr Giustozzi's reports did not address the multiple points in respect of which the previous judge found this appellant's account to be implausible.

30. For these reasons, the appellant cannot succeed on the basis of either ground 1 or 3.

31. The appellant relied on a witness statement from his uncle, AN. It is apparent from the decision of the previous judge (at paragraph 26) that AN was in the UK at the time of the previous hearing in 2011. There is no explanation as to why AN did not submit a statement (or give evidence) at the previous hearing. In accordance with paragraph 40 of *Devaseelan* his evidence needed to be treated with "the greatest circumspection". In any event, AN's statement did not address several of the reasons given by the previous judge for not believing the appellant's account. Therefore, even taken at its highest, it was not evidence that could justify a departure from the findings of the previous judge on the question of whether the appellant faces a risk because of a land dispute. Ground 2 is therefore not made out.

32. I now turn to Mr Bandegani's submission that the judge erred in respect of Dr Buttan's evidence. There were two strands to his argument: first, that the judge erred by not taking into consideration the evidence of Dr Buttan as part of a holistic credibility assessment; and second, that the judge's approach to Dr Buttan's evidence was inconsistent because in paragraph 22(iv) she said his opinion should be "set aside" but in paragraph 27 she gave the report "considerable weight".

33. Paragraph 22(iv) of the decision forms part of the judge's assessment of the appellant's credibility. In this paragraph, the judge acknowledged that Dr Buttan expressed the opinion that the appellant was not exaggerating or feigning, but found that, as Dr Buttan was reliant upon what the appellant told him regarding events in Afghanistan, this did not undermine the credibility findings of the previous judge. In contrast, paragraph 27 forms part of the judge's assessment of whether, because of the appellant's mental health condition, his removal from the UK would violate article 3 ECHR. The judge accepted Dr Buttan's opinion about the appellant's current mental health, but found that Dr Buttan's opinion about the risk of suicide on return to Afghanistan could not be relied upon because it was premised on the appellant's (untruthful) account of events that occurred there. In my view, paragraphs 22(iv) and 27 are not inconsistent, and what Mr Bandegani characterises as an inconsistency is in fact a reflection of the careful and nuanced approach taken by the judge who drew a distinction between Dr Buttan being able, based on the way the appellant presented himself, to form an a reliable view of his present mental health condition and between Dr Buttan's (more limited) ability to assess whether the appellant was being truthful in his account of a land dispute in Afghanistan many years earlier. For these reasons, the appellant cannot succeed under ground 4.

34. A further challenge to the decision in the grounds relates to the judge's finding that the appellant would benefit from family support in the event that he relocates to Kabul. I am satisfied that the judge gave adequate reasons to support, and was entitled to reach, the conclusion she did, for two reasons. First, it was open to the judge to find that the appellant's brother, who currently gives him £30 a week, would continue to support him financially in Afghanistan. Second, given the significant adverse credibility findings in respect of the core of the appellant's claim, as well as in respect of the appellant's claim that his mother and brothers reside in the border region between Pakistan and Afghanistan even though they have Pakistani residence documents, it was open to the judge to find that the appellant had not discharged the burden of establishing (to the lower standard) the absence of family who could support him in Afghanistan. Ground 5 is therefore not made out.

35. Although the judge recognised in paragraph 32 (when considering indiscriminate violence in Kabul) that *AS* had been overturned, it appears that she nonetheless applied the case in paragraphs 42-43 when assessing the reasonableness of internal relocation. Any error, however, was immaterial because the re-made decision in *AS* (*AS (Safety of Kabul) Afghanistan* (CG) [2020] UKUT 130 (IAC)) reached the same conclusion and identified similar factors relevant to assessing the reasonableness of internal relocation. It was consistent with the 2020 decision in *AS* for the judge to find internal relocation to Kabul was reasonable for the reasons given in paragraph 43 of the decision. The appellant therefore cannot succeed under ground 6, as any error was immaterial.

36. In paragraph 40(ii) the judge stated that the identity documents of the appellant's mother and brothers were not produced and that because of this she could not make a finding based on them. The judge does not appear to have taken into consideration that the documents were held (and not produced) by the respondent. I agree with Mr Bandegani that an adverse inference should not be drawn in circumstances where it was the respondent who failed to produce the documents. However, the judge found in paragraph 40(ii) that the appellant's case was undermined by his mother and brothers having Pakistani residence documents as this contradicted his claim that they were unable to reside in Pakistan. Therefore, any error was not material because the documents would not have assisted the appellant. Ground 7 does not, therefore, identify a material error of law.

37. The judge relied on her findings in respect of reasonableness of internal relocation to Kabul to support the conclusion that the appellant would not face very significant obstacles integrating in Kabul. The two test are not coterminous and it does not necessarily follow that because internal relocation is reasonable there would not be very significant obstacles to integration. However, it is plain from a review of the factors set out in paragraph 43 of the decision that in this case the reasons given for finding internal relocation to Kabul would be reasonable also establish that the threshold of "very significant obstacles" was not met. Therefore, ground 8 does not identify a material error of law.

Notice of Decision

38. The decision of the First-tier Tribunal did not involve the making of a material error of law and stands. The appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the appellant or any member of the appellant's family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan

Dated: 18 June 2021