



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/00141/2016

**THE IMMIGRATION ACTS**

Heard at Manchester Civil Justice Centre  
On 11<sup>th</sup> July 2018

Decision & Reasons Promulgated  
On 02<sup>nd</sup> August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

MR M N  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms Khan of Counsel, instructed by Broudie Jackson Canter  
(Manchester)  
For the Respondent: Ms Aboni, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. In this matter the Appellant appeals with permission against the decision of First-tier Tribunal Judge Alis sitting at Manchester on 11<sup>th</sup> January 2018. This is a claim for asylum. I do not think an anonymity order has been made previously, despite this being a claim for protection, but in any event, I make an anonymity order and that is because this matter deals with a protection claim.

2. The Appellant's appeal had been dismissed and the judge had concluded that the Appellant's veracity was of such a nature that he had no alternative but to dismiss the appeal on all grounds. Permission to appeal was granted and the following was said by First-tier Tribunal Judge Boyes when granting permission:

"The grounds assert that the judge erred in making adverse credibility findings in light of the medical evidence, erred in taking into account findings of a decision that was set aside and erred in the application of the country guidance. All the grounds are arguable. In relation to ground 1 there was cogent evidence that the Appellant had memory problems and by going behind that it may be that the judge has overstepped what was permissible. In relation to ground 2 it is arguable that as the previous decision was set aside with no findings preserved the judge should not have placed any reliance upon it. The third ground speaks for itself ..."

3. In her submissions today, Ms Khan said she relied upon the grounds of appeal which she had drafted and she said she abandoned ground 3, which was in respect of the country guidance case of **AK (Afghanistan)** in view of more recent country guidance. In respect of grounds 1 and 2 her submissions and case remains.
4. In summary, her written and oral submissions were as follows. The judge had failed to take account of the Appellant's vulnerability before making adverse credibility findings. The Appellant had not given evidence before the judge because the Appellant was suffering from memory problems. The medical evidence was clear. For example, in the Appellant's supplementary bundle, under cover of a letter of 10<sup>th</sup> January 2018 provided to the FtT at page 17, the following is recorded by the Appellant's general practitioner: "His 6CIT score is 10 out of 28, which means he has significant cognitive impairment of his memory. He has been referred to the Memory Clinic. He is also currently awaiting input from the Mental Health Services", and at page 19 the Appellant's clinical psychologist, part of the Memory Assessment Service, highlighted that the Appellant struggled with attention, speed and memory. More specifically noting the Appellant's ability to concentrate and hold things in attention, the speed of his thoughts when information is more complex and his ability to recall things seen immediately after he had seen them were all matters to bring to the reader's attention.
5. The submissions by Ms Khan also refer to the judgment of the Court of Appeal in **AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123** when at paragraph 30 it was said as follows:

"To assist parties and Tribunals a Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. In addition, Joint Presidential Guidance Note No 2 of 2010 was issued by the then President of UTIAC, Blake J and the acting President of the FtT (IAC), Judge Arfon-Jones. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law. They are to be found in the Annex to this judgment."

6. Ms Khan also refers to the decision of the Upper Tribunal in **JL (medical reports-credibility) China [2013] UKUT 145 (IAC)** and in particular paragraph 26 where it was said as follows:

“A second error we discern consists in the judge’s treatment of the Appellant’s vulnerability. It is clear from her determination that despite disbelieving much of the Appellant’s evidence including the account she gave of her psychological problems (the judge placed particular emphasis on the Appellant’s ability to perform well in her studies) the judge was prepared to accept she was a vulnerable person. ... Given that the judge described the Respondent’s reasons as ‘cogent’ and that they included reliance on inconsistencies, it was of particular importance to see what findings, if any, the judge made about the possible relevance to these of the Appellant being a vulnerable person. In the case of a vulnerable person, it is incumbent on a Tribunal Judge to apply the guidance given in the Joint Presidential Guidance Note No 2 2010, Child, Vulnerable Adult and Sensitive Appellant Guidance at [14] and [15] of this guidance, which deal with assessment of evidence”,

and then paragraphs 14 and 15 of that guidance were cited, which, in summary, say that one must consider the evidence, allowing for possible different degrees of understanding by witnesses and Appellants compared to those who are not vulnerable. It is also said that:

“The decision should record whether the Tribunal has concluded the Appellant (or a witness) is a child, vulnerable or sensitive and 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.”

It is submitted by Ms Khan in this case that the judge had failed to consider that the Appellant was a vulnerable witness and whether this impacted on his credibility.

7. Ground 2 related to a previous decision of First-tier Tribunal Judge Sharkett and that decision had been set aside and had been remitted for a complete rehearing whereas Judge Alis had considered the evidence and that determination within his judgment, and Ms Khan says that that was simply impermissible and one could take an analogous approach to the way in which the former AIT dealt with these matters, for example in the Court of Appeal’s decision in **Swash v Secretary of State for the Home Department [2006] EWCA Civ 1093** where there is reference within that case to the guidance in the case of **Gashi** where it says:

“As a general rule it is best practice for an Adjudicator hearing an appeal de novo not to read the determination of a previous Adjudicator unless expressly invited to do so, so as to avoid any misunderstanding of what has influenced him. There is no prohibition, however, on reading the determination. ...”

Insofar as looking at the evidence is concerned the judge can look at the previous Record of Proceedings but not the earlier determination and that could provide the necessary confirmation of what evidence was given at a previous hearing.

8. In her response Ms Aboni clearly indicated that she relied upon the Secretary of State's Rule 24 reply dated 12<sup>th</sup> March 2018, which says, insofar as relevant, the following:

"The determination shows that the judge gave careful consideration to the medical evidence and ground 1 is no more than a disagreement. Given the judge's conclusions on the medical evidence there was absolutely no reason to disregard the evidence given at the previous hearing, ground 2 has no merit. With respect to ground 3 the judge was correct to follow the existing country guidance, the evidence produced was wholly insufficient to overturn the existing guidance."
9. Ms Aboni also said that the judge did consider the medical evidence at paragraphs 52 and 58 onwards. The lack of memory simply did not highlight why the evidence was inconsistent. She submitted that there were no material errors of law and the judge had made findings which were open to him. In respect of ground 2 the judge had not adopted the findings. The judge had considered only the evidence. The Appellant had failed to give further oral evidence. Here it was important to note that it was not the findings which were adopted or taken into account by the judge, just the evidence which the Appellant had given.
10. In my judgment, having considered the rival submissions, it is abundantly clear that the judge has materially erred in law. Despite the very extensive medical evidence and indeed the clear submissions made to the judge about the Appellant's vulnerability the judge has failed to deal with the Joint Presidential Guidance Note, which itself was set out in various subsequent cases including the Court of Appeal's decision in **AM** and indeed the Upper Tribunal's decision in **JL**. As was made clear, failure to follow the Presidential Guidance will most likely be a material error of law. It is impossible to discern from the judge's decision as to whether he did deal with this very important aspect of the case. The medical evidence at pages 17 to 21 are in the clearest of terms. In my judgment, a finding as to vulnerability one way or the other was essential.
11. As for the judge's conclusion at paragraph 59 that the medical evidence did not explain the Appellant's imperfect recollection of events I conclude that that is impossible to square with what is said in the clearest layman's terms at for example page 21 from the clinical psychologist where she made clear what the Appellant struggled with, including recalling things which he had seen immediately after he had seen them and his ability to concentrate and hold things in his attention. The reference by the GP to significant cognitive impairment of memory, in my judgment, could not have been clearer in this case. So, in my judgment, so far as ground 1 is concerned, it does show a fundamental flaw in the decision-making.
12. Insofar as ground 2 is concerned, whether or not Judge Alis should have been looking at the previous determination, I have to say it was curious in this case that the judge did that and, in my judgment, he was clearly wrong to do so. The decision of Judge Sharkett had been set aside in its entirety. That was a decision of the Upper Tribunal. It was not therefore for this judge to go behind that order of the Upper

Tribunal which had set aside the First-tier Tribunal's decision and although Ms Aboni, in a very persuasive and indeed polite way, seeks to argue that Judge Alis was not seeking to look at the decision in the determination, he was looking to the evidence, I reject that submission.

13. In my judgment, that only begins to open up even more difficulties, not least when the evidence was given by this Appellant before Judge Sharkett. There was no medical evidence setting out the difficulties in respect of the impairment of the memory and thereby there was yet another reason why one simply could not rely on what had been said to Judge Sharkett. In the circumstances, whether alternatively or on its own, that ground also shows a fundamental flaw in Judge Alis' decision.
14. In the circumstances, in my judgment, it is clear that there was a material error of law and thereby the decision of Judge Alis has to be set aside. Having considered the appropriate way forward, in my judgment, because the Appellant has not had a fair hearing for the purposes of Part 3 paragraph 7.2(a) of the practice statement 2012 I remit this matter to the First-tier Tribunal for hearing and that shall take place at Manchester.

#### **Notice of Decision**

There is an error of law in the decision of the First tier Tribunal. That decision is set aside its entirety.

The matter is remitted to the First-tier Tribunal for re-hearing on all issues.

#### **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 him or any member of his 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: A Mahmood

Date: 11 July 2018

Deputy Upper Tribunal Judge Mahmood