Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06943/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 January 2019	**On 6 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

MR S K
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Cohen, counsel
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan. His date of birth is in dispute. The appellant claims he was born on 20 September 2000 whereas the respondent relies on an age assessment by Croydon City Council to the effect that the appellant was born on 30 September 1997. That age assessment is currently being challenged by the appellant challenge by way of judicial review.

2. The appellant entered the UK illegally on 29 December 2015 and claimed asylum on 30 December 2015. His claim was refused by the respondent on 16 June 2016 but he was given discretionary leave to remain until 20 March 2018 as an unaccompanied asylum seeking child

(notwithstanding the age assessment). A notice of appeal, on asylum grounds, was lodged on the appellant's behalf on 5 July 2016 but withdrawn by those representing him at the time, City Legal Partnership, by fax to the First-tier Tribunal on 18 October 2016. The withdrawal was shortly before a pre-hearing review scheduled in the First-tier Tribunal for 20 October 2016, with the substantive hearing listed for 3 November 2016.

3. On 14 March 2018 Lawrence Lupin Solicitors Ltd, on behalf of the appellant, wrote to the First-tier Tribunal requesting that the appellant's asylum appeal be "re-opened" because the appellant had not been fully aware of the consequences of withdrawing his appeal; this had not been explained to him by his former representatives. Lupins noted that the appellant had been assessed as an adult at the time but that this age assessment was being challenged by Wilsons Solicitors LLP, on his behalf, in the light of new evidence which had come to light following the assessment by Croydon City Council.

4. A clerk to the First-tier Tribunal responded on 4 May 2018 to the effect that the Tribunal lacked jurisdiction to hear the application. Lupins sought clarification in the light of **AP (Withdrawals – nullity assessment) Pakistan [2007] UKAIT 00022** (cited in the initial request). The application was set down for hearing on 18 September 2018.

5. The matter came before First-tier Tribunal Judge Gribble ("the FTTJ") on that date. The appellant was represented by Lupins. The appellant pursued his application on the grounds that paragraph 57(f)(iii) of **AP** applied, namely:

> "A withdrawal has been communicated to the Tribunal by a representative without there being clear understanding, or meeting of the minds, between an Appellant and the representative"

6. The FTTJ decided the withdrawal was "valid" and declined to "reinstate" the appeal.

7. The appellant sought permission to appeal on various grounds which I summarise as follows:

   (i) Failure to take account of relevant evidence, confining consideration to certain documents only, despite the appellant's bundle having been appropriately served prior to the hearing.

   (ii) Failure to take account of the totality of the evidence, particularly the medical evidence which was relevant to the assessment of whether the appellant had satisfied the burden of proving that **AP** applied, particularly as at paragraph 57(e) of that judgment.

8. Permission to appeal to the Upper Tribunal was granted in the First-tier Tribunal in the following terms:

> "It is arguable that the Judge has fallen into error at paragraph 1 of the decision in referring to the issue to be decided in the terms set out in paragraph 1. It is arguable that the Judge has approached the matter on an arguably incorrect footing namely the question of reinstatement of the appeal in contradistinction to deciding the validity of the withdrawal. It is arguable that the Judge has not set out a sufficient analysis or attributed sufficient weight to the evidence relating to the mental health of the Appellant, his vulnerability, his capacity in respect of a meeting of minds, the relevancy [sic] of the receiving of therapy from the Children Society, the period during which the Appellant had been suffering from PTSD and the context of the timing of the receipt of legal advice, the impact of "low mood", the relationship between the vagueness referred

to by the Judge and the factors appertaining to the position of the Appellant, the impact of the application of the Joint Presidential Guidance Note No.2 in terms of the applicability of this prior to the commencement of a hearing, the measures taken at the time of the receipt of advice, the role of the Appellant's uncle set against the other factors and an assessment of the cumulative impact of the intermixing of the factors referred to."

9. Hence the matter came before me. At the date of hearing before me, Wilsons Solicitors LLP were acting on this matter, in addition to the judicial review relating to the age assessment.

Background

10. As regards his asylum claim, the appellant's case is that he left Afghanistan in 2015 for fear of forced recruitment by the Taliban and because of the general situation in that country.

11. The appellant's uncle, who resides in the UK, had instructed City Legal Partnership on the appellant's behalf to pursue an appeal against the refusal of asylum. His uncle was present during most of the appellant's appointments with solicitors but there was no qualified interpreter present. The appellant's case is that his uncle did not attend the appointment with solicitors during which he signed the instruction to withdraw the appeal, This document was written in English; it was read to him in English but "never properly translated into Dari". He says he was told by the solicitors he would be able to appeal against any future decision to refuse an extension of discretionary leave to remain. He did not understand at the time, although he has since been told, the difference between the possibility of the grant of refugee status as against that of discretionary leave. As a result, he challenged the validity of the withdrawal of his appeal against the refusal of asylum on the grounds that he had not understood the implications of the withdrawal.

Submissions

12. At the outset of the hearing I indicated to the two representatives that it was clear from the date stamps on the appellant's two bundles of documents, that these had been received by the First-tier Tribunal prior to the hearing: one on 12 September 2018 and the second on 14 September 2018. Furthermore, I noted the appellant's skeleton argument makes reference to the existence of medical evidence of PTSD and depression (albeit in the context of Article 3).

13. Ms Cunha conceded for the respondent that the failure of the FTTJ to have regard to the expert report of Dr Cohen, Consultant Physician, in his assessment of the evidence of the appellant was a procedural error of law; materiality was, however, in issue.

14. For the appellant, Ms Cohen identified the chronology of events leading to the hearing before the FTTJ and expanded upon the grounds of appeal which I have summarised above. She submitted that, in particular, the failure of the FTTJ to have regard to the expert medical evidence of Dr Cohen was a material error of law. She identified the relevant passages from that report. She submitted that, had the FTTJ taken the content of this report into account, he would have been bound to manage the hearing in accordance with the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance, and to have applied it in his assessment of the evidence as to the appellant's state of mind at the date of withdrawal of the appeal. It was submitted that the failure of the FTTJ to take this guidance substantively into account was a procedural error of law which led to objective unfairness in the decision-making. Ms Cohen also drew my attention to the guidance in **SH**

(Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284 and In **FP (Iran) and MB (Libya) v SSHD 2007 EWCA Civ 13.**

15. Ms Cohen further submitted that it was clear from Dr Cohen's report that the appellant's diagnosis of PTSD related to events which pre-dated his arrival in the UK; on a common sense analysis he had been suffering from PTSD at the date of withdrawal. This was relevant to his ability to understand the legal advice he was given.

16. For the respondent, Ms Cunha conceded the failure of the FTTJ to consider all the evidence adduced by the appellant, and particularly the expert evidence of Dr Cohen, was a procedural error. She submitted that it was not necessarily material to the outcome. She noted Dr Cohen's evidence suggested that, notwithstanding his state of mind, he was able to make rational decisions and that he trusted those representing him at that time, City Legal Partnership; he "felt comfortable" with his solicitors. She submitted that he was capable of a meeting of minds with his solicitors at that point; he engaged with them. She submitted that the report did not indicate the appellant's state of mind at the date of withdrawal, albeit Dr Cohen referred to the appellant's PTSD being caused by events pre-dating his arrival in the UK. Ms Cunha told me the respondent did not dispute the appellant's diagnosis of PTSD and the cause of it, as set out in Dr Cohen's report. However, she considered the report did not assist the appellant: it indicated he was capable of giving instructions and evidence in court, albeit pursuant to the Presidential Guidance and **AM (Afghanistan) v SSHD [2017] EWCA Civ 1123.** She submitted that the existence of PTSD would not have impacted on the ability of the appellant to give instructions to his City Legal Partnership. It was submitted that the attendance note of the solicitor who advised the appellant on the merits of withdrawal of the proceedings demonstrated a meeting of minds. The solicitor noted she had advised the appellant she would be happy to proceed with the hearing if the appellant wished her to do so. This suggested the appellant had given informed instructions.

17. Ms Cunha further submitted the FTTJ had accepted the appellant's claimed age when considering the application; he had considered the evidence of the appellant's support worker; he had engaged with the evidence (albeit not that of Dr Cohen). It was submitted that, even if Dr Cohen's evidence had been taken into account, the outcome would have been the same given the FTTJ had implicitly (at [30]) applied the Presidential Guidance. It was submitted the FTTJ did not need to engage with the PTSD diagnosis which was linked by Dr Cohen to events which occurred prior to the appellant's arrival in the UK. Ms Cunha summarised her submissions by saying it was accepted the FTTJ should have considered the expert report but that, in real terms, had he done so the outcome would have been the same; the FTTJ had accepted the existence of psychological trauma and taken mitigating factors into account. Ms Cunha accepted the guidance in **TPN (FtT appeals – withdrawal) Vietnam [2017] UKUT 00295** was relevant, albeit it post-dated the withdrawal.

Discussion

18. The appellant had adduced an expert report by Dr Juliet Cohen, Consultant Physician, dated 31 August 2018 for the hearing before the FTTJ. Dr Cohen's report includes her opinion on the appellant's ability to participate in the hearing and her diagnosis with regard to his mental health. Ms Cunha accepts the failure of the FTTJ to take this into account is an error of law.

19. Some documents listed in the index to the appellant's bundle containing Dr Cohen's report are highlighted with a marker pen. I conclude that this was done by the FTTJ since he makes reference to some of the highlighted documents in his decision. This is consistent with the bundle having been received by the Tribunal prior to the date of hearing. The report of Dr

Cohen is not highlighted in the index. Nor is there any reference to Dr Cohen's report or her conclusions in the FTTJ's decision. I bear in mind the guidance at paragraph 49 of **MA (Somalia) [2010] UKSC 49**, that "Where a tribunal has referred to considering all the evidence, a reviewing body should be very slow to conclude that that tribunal overlooked some factor, simply because the factor is not explicitly referred to in the determination concerned". However, the evidence of Dr Cohen is highly relevant both to the conduct of the hearing and the appellant's application and, had the FTTJ considered it, he would have referred to it.

20. As regards the appellant's ability to participate in the hearing, Dr Cohen states

> "in my opinion he is not unfit to give evidence but his vulnerability in light of his stated age and experiences, and current mental health, should be taken into consideration. He may become stressed in a hearing, feel scared or anxious and have difficulty with his concentration and memory so that his abilities in understanding questions, recalling information, and giving coherent explanations are affected."

21. Dr Cohen states this with regard to the appellant's mental health generally:

> "he meets the diagnostic criteria for post traumatic stress disorder (ICD 10 criteria appended). While the re-experiencing of symptoms are not particularly prominent in his presentation, I find that he is also suffering significantly low mood and other features of depression (ICD 10 criteria appended) including low energy, loss of interest in activities and low self-esteem, and these may be masking some of the PTSD symptoms. PTSD and depression commonly co-exist."

22. Dr Cohen refers to the appellant's condition as having been caused cumulatively by events which pre-date the appellant's arrival in the UK. On that basis, it is, at the least, arguable the appellant may have been suffering from symptoms of PTSD in 2016 when he instructed his solicitors to withdraw his appeal and that this could have impacted on his ability to understand what he was being told by his solicitors about the merits and impact of withdrawal.

23. The FTTJ states at [30]:

> "I make these findings bearing in mind the appellant's age as being a minor on any view of matters in 2016. I find his oral evidence was vague around the advice he had and make every allowance for his age and the evidence from Ms Bonney of his later struggles with his mood. I accept he did not have an interpreter at solicitors appointments. However he had his uncle with him as appropriate adult, a man who had been assessed by social services to care for him, and a man who had been in the UK since 2001."

24. This is not an accurate reflection of the parties' positions at the time: the appellant's claimed date of birth was 20 September 2000 whereas the respondent relied on an age assessment that he was born on 30 September 1997 (albeit, contrary to this position, he had granted the appellant discretionary leave to remain because he was an unaccompanied asylum seeking minor). Thus the appellant's claimed age in October 2016 (the date of withdrawal) was 16 and his deemed age was 19.

25. Furthermore, there is no specific reference in the FTTJ's decision to the application of the Presidential Guidance or the guidance in **AM (Afghanistan)** either with regard to the conduct of the hearing itself or the assessment of the evidence both at the date of withdrawal and the

date of hearing. The evidence of Dr Cohen makes it clear that the appellant was a vulnerable witness at the date of hearing and that his mental health issues were caused by events which pre-date his arrival in the UK. On any reading, the FTTJ should have considered whether the appellant might have been suffering from PTSD at the date of withdrawal and the impact of this on his ability to engage with his legal adviser and indeed to take part in the proceedings. Instead, the FTTJ only had regard to the evidence of Ms Bonney, the appellant's contact at the Children's Society.

26. It was submitted by Ms Cunha that the attendance note of the solicitor who advised the appellant on the merits of withdrawal of the proceedings demonstrated a meeting of minds. The solicitor recorded she had advised the appellant she would be happy to proceed with the hearing if the appellant wished her to do so. This suggested, it was submitted, the appellant had given informed instructions. However, in assessing that evidence the FTTJ failed to take into account the expert evidence of Dr Cohen. That evidence has a direct bearing on the assessment of the ability of the appellant to have a meaningful exchange with his legal adviser (irrespective of the lack of an official interpreter). The appellant's uncle was not present at the appellant's meeting with his legal representative (albeit he was telephoned during the meeting) when the appellant signed the form of authority for withdrawal; thus the appellant's evidence as to what occurred at that meeting is at the heart of the application. That evidence should have been assessed with the expert medical evidence in mind.

27. The FTTJ finds at [28] and [29] the advice of the legal representative to the appellant was "clear" but that was not the issue to be decided: it was whether there was a meeting of minds and whether the appellant understood what he was being advised (per **AP**, paragraph 57(f)(iii), which the FTTJ partially cited as "57(iiii)" at [25]). The FTTJ has made a finding only with regard to the information provided by the legal representative not the appellant's understanding of it. The FTTJ has not therefore addressed the crux of the application. Nor has the FTTJ stated why he rejects the appellant's own evidence on the issue, namely that the appellant did not understand the impact of the withdrawal. These failures, together with the failure to take into account the expert evidence of Dr Cohen render the FTTJ's findings unsustainable.

28. In summary, I agree with Ms Cunha that the failure of the FTTJ to have regard to the existence and content of Dr Cohen's report, given its reach, is a procedural error of law. This evidence should have been taken into account not only in considering the conduct of the hearing but in the round with the remaining evidence on the substantive issue, namely the validity of the withdrawal. Had it been, the assessment of the appellant's own evidence and his ability to understand the advice of his solicitor in October 2016 might have been different. As was said by Keene LJ in **IA (Somalia) v Secretary of State for the Home Department [2007] EWCA Civ 323**:

> "… in public law cases, an error of law will be regarded as material unless the decision-maker must have reached the same conclusion without the error … [A]n error of law is material if the Adjudicator might have come to a different conclusion … "

29. For these reasons, the decision of the First-tier Tribunal must be set aside in its entirety.

30. It was submitted that the evidence was sufficient to enable me to remake the decision as regards the validity of the withdrawal. However, I am unable, for the reasons set out above, to preserve any findings of fact. It is not appropriate for me simply to adopt as my findings the appellant's witness statement without giving the respondent the opportunity to cross-

examine him and the appellant did not attend the hearing before me. Furthermore, the appellant's current solicitors, Wilsons, have issued proceedings to challenge the age assessment undertaken by Croydon City Council and Ms Cohen told me judgment was due to be handed down a few days after the hearing before me. That judgment has a bearing on this case: it will identify the appellant's age in October 2016, when the notice of withdrawal was lodged.

31. I therefore remit this matter to the First-tier Tribunal for a fresh decision to be taken on the validity of the withdrawal and, if it is declared invalid, for a decision on the appeal against the refusal of asylum.

Decision

32. The making of the decision of the First-tier Tribunal involved a material error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from FTTJ Gribble.

33. Given the nature of this appeal, the appellant is entitled to anonymity in these proceedings.

A M Black

Deputy Upper Tribunal Judge Dated: 4 February 2019

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 their 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.

A M Black

Deputy Upper Tribunal Judge Dated: 4 February 2019

DIRECTIONS

1. Any further documentary and/or witness evidence relied upon by either party is to be filed with the Tribunal and served upon the other party by no later than 28 days before the date of the hearing in the First Tier Tribunal.

2. The appellant and/or his representative is to file and serve on the respondent a chronology of events relating to the withdrawal of the appeal and the substantive asylum claim.

3. The appeal is listed at Taylor House with a time estimate of four hours to be heard at 10.00 am on ……. The tribunal will decide, as a preliminary issue, the challenge to the appellant's withdrawal of his asylum appeal and, if that is successful, the substantive appeal against the refusal of asylum.

4. A Dari (Afghan) interpreter is required.

A M Black

Deputy Upper Tribunal Judge Dated: 4 February 2019