



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
PA/10715/2017**

APPEAL NUMBER:

THE IMMIGRATION ACTS

Heard at: Field House

**Decision and Reasons
Promulgated**

On: 4 April 2019

On: 9 April 2019

Before

Deputy Upper Tribunal Judge Mailer

Between

**N K
ANONYMITY DIRECTION MADE**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

**For the Appellant: Mr A Mackenzie, counsel, instructed by TRP
Solicitors**

For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND REASONS

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them 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.

1. The appellant is a national of Afghanistan, born on 1 January 1998. He appeals with permission against the decision of the first-tier Tribunal allowing his appeal against the respondent's decision to refuse his asylum and human rights claim. She allowed his appeal under Article 3 of the Human Rights Convention.
2. In granting permission to appeal, First-tier Tribunal Judge Bird found that it was arguable that in failing to either dismiss or allow the protection appeal as the Judge was required to do, there has been an error. It is further arguable that whilst she set out extensive findings of the consultant psychiatrist, she does not state that in considering inconsistencies she bears in mind the appellant's mental health and did not make any findings as to how the appellant's mental health may have affected his credibility, if at all. It was also arguable that the Judge failed to consider the risk of inhuman and degrading treatment to the appellant as a person with mental health problems.
3. The appellant had contended before the First-tier Tribunal that he was at risk as he had refused to assist the Taliban. His late father and uncle were members of the Taliban. His father was the deputy of the District Governor and their area was controlled by the Taliban. He asserted in his interview that about sixteen or seventeen years ago, his father was killed whilst working for the Taliban.
4. The appellant claimed that his uncle used to carry out killings on behalf of the Taliban. When he was told to kill a person from his village, the appellant refused. He was injured in an attack by government forces on the family home. One of his brothers is a British citizen. The other is a failed asylum seeker whose appeal was rejected [26].
5. The Judge accepted that the appellant was suffering from a severe mental illness and that he would not receive adequate treatment in Afghanistan. She also accepted the evidence of the consultant psychiatrist and country expert regarding the adequacy of treatment available in Afghanistan.
6. The Judge stated in the Notice of Decision: "The appeal is allowed under Article 3".
7. Mr Mackenzie, who did not represent the appellant before the First-tier Tribunal, submitted that the Judge rejected the appellant's claim to be at risk from the Taliban having regard to discrepancies in his own account and between his account and those given by his brothers. However, he submitted that she did not indicate in her judgment what the outcome of the appellant's protection appeal was, and in particular whether she allowed or dismissed it. The only formal decision was to allow the appeal under Article 3.
8. Although having regard to the findings at [40-42], she may have intended to dismiss the appeal on asylum and/or humanitarian protection grounds, this was not in fact done. Nor did she explain why her rejection of the

appellant's credibility as a witness save as to the reality and severity of his mental illness, led to the dismissal of his appeal.

9. Her failure to determine the protection appeal constituted a material error.
10. In addition, before making findings on credibility, she failed to take into account the psychiatric evidence of Dr Bell and the expert report of Mr Foxley. He referred to the decisions of the court of appeal in Mibanga v SSHD [2005] EWCA Civ 367 and SA (Somalia) v SSHD [2006] EWCA Civ 1302 at [32-33]. The Judge erred in not having regard to the medical or other expert evidence before reaching findings on credibility. She “fell into the trap” of finding that Mr Foxley's report did not assist her in light of the credibility assessment which she had already made at [40] that the evidence of his mental health condition did not assist the appellant at all as regards credibility.
11. Mr Mackenzie noted that Dr Bell expressed the view that the appellant's severe psychiatric conditions were caused by his experience of extreme violence in Afghanistan, including the deaths of his father and uncle and the bombing of his family home. That evidence was therefore relevant, given that his psychiatric conditions were accepted, to consider the extent to which they supported his account of events in Afghanistan.
12. In any event, the fact that the appellant was in poor mental health may have affected the quality of his evidence. He referred to the decision of the Senior President of Tribunals in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123 at [21(d)] that expert medical evidence can be critical in providing an explanation of the difficulties in giving a coherent and consistent account of past events.
13. Mr Mackenzie also relied on the guidance given in the Senior President's 2008 Practice Direction to the First and Upper Tier Tribunal: Child, Vulnerable Adult and Sensitive Witnesses, and the Joint Presidential Guidance Note no. 2 of 2010: Child, Vulnerable Adult and Sensitive Witness Guidance. The Judge did not consider the extent to which his poor mental health might have explained any discrepancies in his evidence.
14. He submitted that Mr Foxley's report found that aspects of the appellant's account were plausible in the light of the situation in Afghanistan, including the recruitment practices of the Taliban, the risks to persons who disobeyed them and the extent to which the appellant could have remained in hiding, if of interest to the Taliban. These matters needed to be factored into the credibility assessment but were dismissed briefly as an add on to the findings that the Judge had already reached.
15. The third ground of appeal asserts that the Judge failed to make findings on the risk that a mentally ill person faced on return. He referred to the decision in NO (Afghanistan) v SSHD [2016] EWCA Civ 876.

16. A risk of inhuman or degrading treatment of mentally ill people on return to their country of origin would qualify them for humanitarian protection: per Tomlinson LJ at [38] with reference to the findings of the First-tier Tribunal reproduced at [32], including the First-tier Tribunal's citation of evidence that many Afghans suffering from mental health problems are believed to be possessed, some are chained in rooms and others are simply abandoned by their families; and its conclusion that there was a real risk that [the appellant] will be shunned, will become homeless and destitute or fall victim to those who use inhumane methods in order to attempt exorcism.
17. Tomlinson LJ noted at [44-45] that such cases are not "health" or "medical" cases in the usual sense:

"The appellant does not simply claim that the healthcare available to him in the UK is not available in Afghanistan, rather he submits that his condition, which generates the need for that care, of itself gives rise to a risk of ill treatment in Afghanistan. He is not complaining about the consequences of the lack of treatment in Afghanistan but about the consequences to which his condition gives rise in Afghanistan, that is to say, the risk of inhuman or degrading treatment.

[...] It is a complete misreading of the regulatory and statutory materials...to think that the risk of inhuman or degrading treatment does not generate an entitlement to humanitarian protection if caused by a medical condition. On the contrary, it is the risk of inhuman or degrading treatment which is capable of lifting those cases out of the category of mere "medical cases" into a category attracting, exceptionally, humanitarian protection."
18. Mr Mackenzie also submitted that if a Convention reason were accepted for the persecution (which did not seem to be argued in NO (Afghanistan) an individual facing such a risk would be a refugee.
19. He referred to Mr Foxley's expert report at paragraphs 53-64, where he identified a number of features of the treatment of mentally ill people in Afghanistan which raised the same issues as in NO (Afghanistan) about whether the appellant was entitled to humanitarian protection and/or refugee status. Those features included evidence of mentally ill people: being chained up; being ostracised by their families and by society generally; becoming destitute; and/or being exploited by criminals, traffickers or armed militant groups.
20. Mr Mackenzie submitted that the Judge expressly relied on Mr Foxley's report in concluding that there would not be adequate treatment for the appellant's mental health condition at [44], but nevertheless appears to have overlooked the passages which indicated that he would not only be deprived of treatment but would be actively harmed if returned.
21. On the basis of Mr Foxley's report, Dr Bell also referred to a risk that those who suffer from mental health difficulties tend to be treated harshly and the appellant might end up living rough or being exploited by others.

Although accepting Dr Bell's report, the Judge did not make any findings on this.

22. Mr Mackenzie submitted that the appellant was a member of a particular social group, having immutable characteristics and would be marked out as a mentally ill person.
23. Ms Pal referred to the respondent's position on the appeal as set out in the Rule 24 notice. The respondent does oppose the appellant's application for permission to appeal and invited the Tribunal to determine the appeal with a fresh oral hearing. Although it may be inferred from the First-tier decision that the asylum claim was in fact dismissed, it was submitted that more and fuller detail was required in order for the decision to be above criticism by the appellant.

Assessment

24. I am satisfied that the decision of the First-tier Tribunal did involve the making of an error on a point of law. The Judge did not dismiss or allow the protection appeal. Nor did she consider whether the inconsistencies she referred to may be referable to the appellant's mental health. Nor did she consider the medical and expert evidence as part of a holistic assessment of the appellant's credibility which was not simply to be treated as an add on or separate exercise. Nor was it considered whether a person facing such a risk would be a refugee as a member of a particular social group under the Convention.
25. In the circumstances I set aside the decision. Mr Mackenzie submitted that this is an appropriate case for remittal to the First-tier Tribunal for a fresh decision to be made subject to preserving the Judge's findings in respect of the appellant's mental health. All other issues 'are at large'. Ms Pal did not disagree.
26. The nature and extent of the judicial fact finding necessary for the decision to be re-made is such that it is appropriate to remit the case to the First-tier Tribunal. Apart from from preserving the Judge's findings regarding to the appellant's mental health, no other findings of the First-tier Tribunal are to stand.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law.

The decision is set aside and is remitted to the First-tier Tribunal (Birmingham) for a decision to be made. Apart from preserving her findings regarding the appellant's mental health, no other findings of the First-tier Tribunal shall stand.

Anonymity direction continued.

Signed

Date 7 April 2019

Deputy Upper Tribunal Judge Mailer