Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11265/2019 (V)

THE IMMIGRATION ACTS

Heard by Skype at Field House	**Decision & Reasons Promulgated**
On 8th January 2021	**On 4th March 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR AA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Bazini, instructed by Times PBS Ltd
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

The appellant appeals with permission against the decision of First-tier Tribunal Judge Farmer promulgated on 12th February 2020 in which she dismissed the appellant's appeal against a decision of the Secretary of State dated 31st October 2019 to refuse asylum, humanitarian protection and protection under the European Convention. The appellant claims to have left Afghanistan in May 2015 with the assistance of an agent and arrived in the UK on 8th January 2016, promptly claiming asylum. His appeal was dismissed on 20th January 2017 by First-tier Tribunal Judge Baldwin and both the First-tier and the Upper Tribunal refused permission to appeal and he was appeal rights exhausted on 27th April

2017. In October 2017 he filed further submissions and they were refused on 31st October 2019 and that decision is the subject of this appeal.

The grounds for permission to appeal assert that (1) there was a failure to take into account material matters before reaching findings, and when assessing credibility it was axiomatic that before core findings are reached, all material evidence is considered. The determination showed that such findings were made without regard to the evidence concerning the appellant's medical condition both documented and oral. **HH (medical evidence; effect of Mibanga) Ethiopia [2005] UKAIT 00164** was referenced, in particular paragraph 19. It was an error of law if the judge failed to treat the medical report as part of the overall evidence which should be considered in the round.

Further, at paragraph 40 the judge stated after first finding the evidence and documents not credible: "I must therefore view the conclusions of Dr Giustozzi in light of my findings of fact." This was the wrong approach and the findings of fact should only have been reached after considering the background and expert evidence which was relevant to the credibility and plausibility of the claim.

The judge failed to consider both the medical evidence and the expert evidence before finding the findings on credibility.

Ground 2, asserted there were unreasonable findings and those contrary to **Devaseelan** approach; the starting point for the judge was that though First-tier Tribunal Judge Baldwin had rejected aspects of the appellant's account he had nevertheless accepted that the appellant's father probably was, for a comparatively short time a police officer but was killed in the line of duty in 2015 "eighteen months ago". The judge also accepted the documentary evidence that the appellant had submitted in this regard and the judge stated at paragraph 23: "The ministry letters do however indicate that 'A…' had been made the subject of an award for his honest and tireless effort by July 2014 and was killed in face-to-face fighting a year later by which time he was a team leader."

Judge Farmer at paragraph 38 decided that she was entitled to depart from these findings for the reasons she identified at 33 to 37 but her reasoning was flawed because at paragraph 33 the judge's observations are a distortion. In his oral evidence the appellant stated that he started work for his father around the end of 2014. This was hardly a discrepancy with his witness statement where he stated that this was at the start of 2015. Five years on, this being a month or so out was hardly a discrepancy worthy of damaging credibility. Indeed the reference in his witness statement the appellant had referred to 2014-2015. Notwithstanding Judge Baldwin had been aware of those discrepancies when he made his findings.

At paragraphs 36 to 37 Judge Farmer notes discrepancies of a few months' period as to when the appellant's father was killed but the point was never put to the appellant and of course involved giving evidence years later when memories may fade.

More importantly, no consideration was given to the medical evidence before reaching a view on discrepancies and such evidence included the letter from the Refugee Council dated 30th January 2020 which confirmed that the appellant had received counselling and that he had "exhibited symptoms of PTSD including intrusive distressing memories, recurring nightmares, dissociative reactions, mood swings and physiological reactions to reminders of traumatic events he had experiences".

At paragraph 39 the judge then dismissed the new documentary evidence as not being credible in light of her new credibility findings which were not open to her. This was a woefully inadequate approach and the judge failed to even identify and consider the nature of the documents.

In relation to internal relocation, the judge detached her factual findings from the medical evidence. The judge referred to some of the medical evidence but the findings were flawed as she had already reached unlawful credibility findings. There was no reference to the numerous references to PTSD, suicidal ideation and depressive condition along with other ongoing mental health conditions referred to by numerous practitioners over a four to five year period. It was evident that the appellant was prescribed medication due to his 'ongoing problem and is associated with a number of flashbacks to his time in Afghanistan. As a result he was 'struggling to sleep properly'. The GP letter of 28th November 2016 and the GP records of June 2016 showed the appellant was prescribed zopiclone, medication for troubled sleep.

Submissions

At the hearing before me Mr Bazini emphasised that the judge failed to take into account the expert evidence and the documentary evidence in the round and failed to apply the medical evidence until paragraph 52 of the decision. The decision was fundamentally flawed. I pointed out that the judge had made findings in the alternative such as paragraph 43 where the judge found that if she was wrong about his father's involvement with the government, then the appellant had not established to the lower standard of proof that his scant involvement with the father over two and a half months would be of any interest to the Taliban five years later. That finding was made at paragraph 43, and separately from the finding which rejected First-tier Tribunal Judge Baldwin's conclusions that the appellant's father did indeed work for the government and therefore was at risk from the Taliban and consequently so was his son.

Mr Bazini responded that at paragraph 53 the judge described some of the symptoms and problems in relation to his mental health but concluded that the evidence was not credible, finding that the timing for the request for medical evidence, that is immediately prior to the last decision of Judge Baldwin's and immediately prior to this appeal hearing, was 'suspicious'. Mr Bazini took me through the medical evidence to which the judge had failed to refer and noted that there was no medical evidence before First-tier Tribunal Judge Baldwin that the appellant had a long history of attempting to seek medical assistance for his mental health condition. There were references to his severe mental

health from 2016 and these were not mentioned by the judge. For example, at page 89 of the appellant's bundle there was a letter from Natasha Moskovici dated 30th January 2020 which stated that the appellant scored:

> *"32 out of 40, which is a high response and indicated high mental distress. Of particular note were Mr A feeling he could not cope when things go wrong; feeling tense, anxious or nervous; feeling despairing or hopeless and unhappy; and being distressed by unwanted images or memories as well as strong concerns about his family back home."*

In the bundle of subjective evidence before the First-tier Tribunal, I note there was a referral by the Enfield IAPT Team, Barnet, Enfield and Haringey NHS for cognitive behavioural therapy and a letter dated 20th June 2016 from Let's Talk, Barnet, Enfield and Haringey NHS inviting the appellant for an appointment (this post-dated a letter that he had failed to attend). Mr Bazini indicated the appellant had been seeking psychological assistance since April 2016. There was no reference by the judge to the letter of the GP from the Charlton House Surgery confirming the ongoing mental health problems of the appellant. Mr Bazini submitted that the approach to the mental health of the appellant was flawed in terms of internal relocation because **AS (Afghanistan) v Secretary of State for the Home Department [2019] EWCA Civ 873** as identified by the judge and **AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118** confirmed that in any assessment it was necessary to consider the age, nature and quality of the support network or connections in Kabul and Afghanistan, physical and mental health, his language, education and vocational skills when determining whether it would not be unduly harsh for relocation to Kabul.

Mr Bazini reiterated that the judge had erred in approach to the report of Dr Giustozzi and had only factored in that report after making adverse credibility findings, which is plainly an error of law.

Mr Avery submitted that the challenge was simply a disagreement with the findings. There were serious discrepancies in the evidence of the appellant which went to the core of his case. Judge Baldwin understood the case to be that the appellant's father did not start work until 2014 but the evidence before the judge was that the appellant's father worked from 2010. As the judge stated at paragraph 35, this had seriously damaged the appellant's case. This would not arise from the mental health issue or from Dr Giustozzi's report, which primarily went to plausibility. The judge did go through the medical evidence and looked at it in detail and just because she did not mention all parts was not a material error. The judge did refer to that which was relevant and referred to the GP records and noted that the appellant was not on any medication for depression.

Analysis

I am mindful of the reminder, in **Lowe v SSHD** [2021] EWCA Civ 62 by McCombe LJ at paragraph 29, that appellate courts should exercise caution when interfering with evaluative decisions of first instance judges. **UT (Sri Lanka) v SSHD** [2019] EWCA Civ 1095 held at [19]

> *'although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one'.*

Despite the judge's preliminary directions at paragraph 25 that he or she should look at all the evidence in the round before making any findings, that regrettably does not appear to have been done.

Between paragraphs 35 to 39 the judge made a series of credibility findings. That was prior to addressing the medical or expert evidence.

Even some of the credibility findings were criticised in their own right. For example, some of the inconsistencies/discrepancies found in the appellant's evidence were in fact already within the evidence considered by First-tier Tribunal Judge Baldwin but Judge Farmer made a finding that, "his evidence in his witness statement which he confirmed was correct" … "directly contradicts the case he put before First-tier Tribunal Judge Baldwin as summarised in his decision". It is correct that some of the contradictions were between the witness statements and the further oral evidence. For example, when making adverse credibility findings, at paragraph 37 Judge Farmer found inconsistency between evidence as to when the appellant's father was killed given before Judge Baldwin (July 2015) and further evidence submitted in the witness statement before Judge Farmer (April 2015 and as a result the appellant was taken in May) and he states:

> *"The appellant now says it was April 2015 and I find this material inconsistency damages his credibility."*

Nonetheless the appellant gave oral evidence at court and there appeared to be no factoring in of the mental health evidence when assessing this credibility and latterly a rejection of that evidence on the very grounds of the previous adverse credibility finding.

By paragraph 39, having *already* made credibility findings, the judge states:

> *"I assess the new documentary evidence in the light of my findings on credibility." … "I find that in the light of the evidence before me I can and do find that these are not credible documents. I find this in the light of the inconsistencies and the discrepancies I have highlighted."*

The judge then at paragraph 40 continues:

> "*I must therefore view the conclusions of Dr Giustozzi in light of my findings of fact."*

The hearing before First-tier Tribunal Judge Baldwin was conducted on 13th January 2017. There was, however, evidence dating from April 2016 that the appellant had mental health problems. When rejecting the evidence at paragraph 55, the Judge Farmer found, however, that:

> *"The timing of the appellant's request for counselling just prior to his January 2017 asylum appeal and just prior to his February 2020 appeal is suspicious. I put the timing of these requests alongside my general credibility findings and I am not satisfied that the appellant has a genuine mental health condition. I find it very surprising that if he did he would tell his doctor he was otherwise well and he would have no medication for depression."*

That finding does not sit easily with the chronology of the evidence.

In effect, the medical evidence is addressed from paragraph 52 onwards and is not taken into account before the judge makes general credibility findings. From the structure of the determination it is clear that the treatment of the medical evidence is contrary to **Mibanga [2005] EWCA Civ 367** ; in a nutshell when assessing credibility, the evidence, including medical evidence (and expert evidence) should be considered in the round.

As stated in **MN and IXU v The Secretary of State for the Home Department [2020] EWCA Civ 1746** at paragraph 250:

> *"The point made by **Mibanga** is not that the expert evidence and the issue of credibility must be considered in a particular order but that the former must be allowed to feed into the latter."*

I can accept that there remain some serious difficulties with the appellant's account to which the judge was entitled to give real weight. However, it is not clear from the face of the decision that the judge has factored in that the appellant is a vulnerable witness or the medical evidence. Overall the expert evidence was considered serially rather than feeding into the credibility analysis as required by **MN and IXU**.

The judge proceeded to reject the mental health evidence as being 'suspicious', having *already* made the adverse credibility findings but having omitted consideration of the medical evidence or that it dated from 2016 when considering credibility. That approach was flawed.

I considered whether the alternative finding of relocation rescued the determination. The judge stated:

> *"If I am wrong about his father's involvement with the government, then the appellant has not established to the lower standard of proof that his scant involvement with this father over two and a half months would be of any interest to the Taliban five years later [43]"*

and

> *"I find that in any event the appellant could safely relocate to Kabul, or whether that would be unduly harsh*" (sic).

At paragraph 61 the judge stated that she had been addressed by Mr Bazini that she could properly depart from country guidance in circumstances where there are very strong grounds. Even so, when assessing the position on relocation the judge had to make an accurate assessment of the medical evidence which would in turn influence whether this appellant could return to Kabul. His mental health was a relevant factor but had been rejected owing to the flawed credibility findings. The assessment of whether the appellant can return to Kabul must take into account a proper assessment of the mental health evidence and, even if the expert report of Dr Guistozzi is less helpful, that too, for the proper application of **Mibanga**. The assessment and its impact on the prospects of the appellant's return was not conducted in a sustainable way and that error was material.

For these reasons I find that there was a material error of law.

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

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.

Direction

Skeleton arguments of no more than 10 pages (A4) should be filed with the First-tier Tribunal and served at least 14 days prior to any substantive hearing together with any further evidence.

Signed Helen Rimington Date 19th February 2021

Upper Tribunal Judge Rimington