



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/09056/2012

THE IMMIGRATION ACTS

Heard at North Shields

Determination

On 12 June 2013

Promulgated

On 4 July 2013

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR NOOR ABAS MIRALIKHAIL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Sjøvoll of Counsel

For the Respondent: Mr J Kingham, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) This is an appeal with permission against a determination by Judge of the First-tier Tribunal Horvath dismissing the appeal on asylum and human rights grounds.
- 2) The appellant was born on 1 March 1992 and is a national of Afghanistan. His asylum claim is based on a fear of the Taliban arising from his father's position as a commander with Hizbe-e-Islami. The appellant's father was killed in 2000 in a night time raid by the Taliban on the family home. Between 2000 and 2005 the appellant maintains that he was living with his maternal uncles and did not have problems with the Taliban because they

did not know where he was. In 2005, when he was 13, he returned to his home village. Shortly after his return the Taliban attacked the family home at night but they were frightened away by neighbours and other villagers who fired upon them. The appellant was wounded in the attack. Some time later the appellant was abducted by the Taliban and detained by them. He was beaten, tortured and raped. He was rescued by a shepherd from the hut in the mountains where he was being held. Around 2 or 3 months after this the appellant left Afghanistan.

- 3) The Judge of the First-tier Tribunal noted that the appellant had a previous appeal before the First-tier Tribunal in March 2011, which was dismissed. Applications to seek permission to appeal against this decision were unsuccessful. The Judge of the First-tier Tribunal took this previous determination as the starting point for consideration of the current appeal, in terms of Devaseelan [2004] UKIAT 00702.
- 4) The appellant did not give oral evidence in the present appeal. Instead reliance was placed on a number of medical reports which were not before the Tribunal in the previous appeal. The Judge of the First-tier Tribunal considered that there would be no good reason for disturbing the factual findings made in the previous appeal “*unless the volume of fresh medical evidence and/or expert country evidence now produced*” was such that it would persuade the judge to reach different conclusions. Subsequently the judge found that there was no justification for reaching a different conclusion and relied upon the adverse credibility finding made in the previous appeal.
- 5) The application for permission to appeal lists the fresh evidence which was before the First-tier Tribunal in the present appeal. The medical evidence comprises:
 - i) Psychiatric report by Professor Katona, dated 12 May 2011.
 - ii) Medical report by Dr Juliet Cohen, Head of Medical Services at the Medical Foundation, dated 16 June 2011.
 - iii) Medico-legal report by psychotherapist Max Gillespie of the Medical Foundation, dated 2 September 2012.
 - iv) Letter from Consultant Surgeon, Mr D A Browell, Gateshead NHS Foundation Trust, dated 29 March 2011.
- 6) The application also lists fresh country evidence, as follows:
 - i) Expert report by Dr Antonio Giustozzi, dated 15 November 2012.
 - ii) Amnesty International report by Paul Dillane, dated 21 November 2012.

- 7) The grounds of the application for permission to appeal are summarised as follows:
- i) the judge failed to consider adequate or at all the report of Dr Cohen, and the assessment of the appellant's scarring, and failed to provide any or any adequate reasons for placing no weight on that scarring assessment;
 - ii) the judge failed at all to consider the relevance of the country evidence of Dr Giustozzi to the credibility assessment of the appellant;
 - iii) the judge erred in dismissing the assessments of Professor Katona, Dr Cohen and Max Gillespie on the basis that the authors of those reports made their diagnoses of the appellant having assumed that everything the appellant was telling them was true; and
 - iv) the judge made material errors in her approach to the report of the psychotherapist, Max Gillespie.
- 8) In accordance with directions of the Upper Tribunal dated 20 February 2013 the appeal was listed for hearing only on the question of whether there was an error of law in the decision of the Judge of the First-tier Tribunal. The reason for this was that if an error of law was found up-to-date medical reports would be required as well as up-to-date country information.
- 9) I should record that Mr Kingham, appearing on behalf of the respondent, did not have a number of the reports relied upon by the appellant prior to the day of the hearing. These were made available to him and the hearing proceeded in the afternoon. I would like to record my appreciation to Dr Kingham for allowing the appeal to proceed as listed. I was also assisted by the written submission prepared by Ms Sjøvoll.
- 10) I was addressed by Ms Sjøvoll on behalf of the appellant. She relied on the application for permission to appeal and on the written submission. She pointed out that Dr Cohen described a scar on the appellant's calf as typical of a high velocity wound. According to the appellant this was the wound he received when the Taliban raided his house and killed his father in 2000. There was no medical report on this before the Tribunal in the earlier appeal. In the present appeal the judge nevertheless found that Dr Cohen's report was not sufficient to revisit the credibility findings made in the previous appeal. The judge preferred an earlier report by Dr Leggat of the Medical Foundation because Dr Leggat had seen the appellant on more than one occasion whereas Dr Cohen had seen the appellant only once. At paragraph 45 of the determination the judge recorded that Dr Cohen had based her opinion entirely on what the appellant had told her but the appellant lacked credibility.
- 11) Ms Sjøvoll continued that Dr Cohen had given evidence in her report about the appellant's ano-rectal symptoms but the judge had concluded that there

was no fresh evidence in relation to these. Ms Sjøvoll submitted that in relation to Dr Cohen's report the judge made three fundamental errors in (1) ignoring Dr Cohen's evidence as to the high velocity wound, (2) assuming that Dr Cohen's opinion was based entirely on what the appellant had told her; and (3) finding that there was no fresh evidence of rape notwithstanding Dr Cohen's evidence on the appellant's ano-rectal symptoms. Ms Sjøvoll continued that the scarring assessment by Dr Cohen was not based on the appellant's account but on a clinical examination and analysis. The fact that Dr Cohen saw the appellant only once should not detract from the weight to be given to her report. Dr Cohen's conclusions were based on her own expertise and were not tailored to the appellant's account. The judge did not give adequate reasons for finding that Dr Cohen's report did not require the previous judge's findings on credibility to be revisited.

- 12) Ms Sjøvoll then turned to the report by Dr Giustozzi. At paragraph 51 of the determination the judge referred to the reports of Dr Giustozzi and of Mr Dillane. The judge observed that Dr Giustozzi's opinion that the appellant would be a target on return was essentially based on the story as told to him by the appellant. The judge stated that the expert witnesses were not in a position to verify the truthfulness of the appellant's story. As the appellant's credibility had been discredited in the previous appeal and the findings made in the previous appeal must stand, then the expert's reports were of limited assistance.
- 13) Ms Sjøvoll submitted that Dr Giustozzi was an expert who had given evidence before numerous tribunals and whose evidence was based on his own experiences and expertise. He had not fitted his conclusions to what he was told by the appellant. The analysis by the judge of Dr Giustozzi's report was inadequate and amounted to a material error of law. That evidence was not before the judge in the previous appeal and it contained information which was not predicated on the truth of the appellant's account. It was rather independent verification that the appellant's account might be plausible in the context of events happening in his district in 2000. The Judge of the First-tier Tribunal in the present appeal failed to take this into account.
- 14) Ms Sjøvoll observed in relation to the reports that the judge had concluded that these were based on assumptions that the account given by the appellant was true. For example at paragraph 39 the judge observed that the report by Professor Katona was based upon a history provided directly to him by the appellant. The judge then said that Professor Katona's expert opinion was essentially based on the story as told to him by the appellant. In the report, however, Professor Katona had looked at the behaviour of the appellant when describing his symptoms and had described the state of "dissociation" when the appellant was describing his abduction. This formed a part of his diagnosis. Professor Katona found the appellant's account was consistent with the appellant's appearance and with the Professor's medical knowledge of the effects of PTSD. Professor Katona had

access to the appellant's medical records. The judge was wrong to find that his analysis was based only on the appellant's version of events. Professor Katona expressly considered whether the appellant was exaggerating or faking his symptoms and gave reasons for concluding this was not the case. Ms Sjøvoll pointed out that in her report Dr Cohen described the appellant's demeanour when talking about his experience of abduction in similar terms to that of Professor Katona and considered whether the appellant might be fabricating his account.

- 15) Ms Sjøvoll referred to paragraph 34 of the determination, where the judge addressed the report by Max Gillespie. The judge stated that Max Gillespie was not in a position to factually verify the truth of the appellant's account. His psychological opinion of severe PTSD was essentially predicated upon the surmise that what the appellant told him was the truth. Ms Sjøvoll submitted that according to Mr Gillespie his report was based on his own experience and the appellant's presentation and demeanour, which Mr Gillespie found consistent with the account of torture and rape. The judge did not adequately consider this. At paragraph 30 the judge observed that the report by Mr Gillespie was based on 14 sessions with the appellant on a weekly basis but said that it was unclear how long each session took. This was contrary to Mr Gillespie's report, which stated that the sessions were generally one hour long unless shortened. The judge also questioned why the sessions were not continued once the appellant was released from detention. Had the judge raised this issue at the hearing, which she did not, she would have been informed that the sessions had been resumed following the appellant's release from immigration detention and were continuing at the date of the hearing before the First-tier Tribunal. The judge made an error of fact in this regard which affected the assessment of the evidence and amounted to an error of law. The judge stated at paragraph 32 that the account the appellant had given to Mr Gillespie was different from the account he had given to UKBA but again the judge had misapprehended the evidence in relation to this. These errors were material. Had the judge not made these errors the assessment of credibility might have been different.
- 16) On behalf of the respondent, Mr Kingham submitted that the judge had considered the reports adequately and given full reasons for the findings made. The question before the judge was whether the appellant had been targeted by the Taliban and would continue to be targeted on return. None of the reports were of assistance in concluding that the appellant would be targeted on return because of his father's involvement in Hizbe-e-Islami. A credibility assessment had been made by the judge in the previous appeal and this stood up to the subsequent challenge. The appellant had given an inconsistent account about the time when he was shot in the leg and had said that this was 5 years after the Taliban shot his father. The reports by Dr Cohen and Mr Gillespie were inconsistent with the report by Dr Leggat. Following the previous appeal two applications for permission to appeal were unsuccessful. The approach taken by the judge in the present appeal was justified. The psychiatric reports did not adequately address the issues

raised in the original appeal. The report by Professor Katona was based on history provided by the appellant and there was no material from any other source. In a medical report it was difficult to identify the cause of trauma. In any event, how did the reports reach the conclusion that the appellant would be at risk from the Taliban? This was not covered by the country expert. Even though the scarring was of empirical value, this still had to be shown to be consistent with the appellant's account and an assessment of credibility had to be made.

- 17) Having considered the parties' submissions, I am satisfied that the Judge of the First-tier Tribunal made an error of law in consequence of which the decision must be set aside. Judge Horvath took as the bench mark for consideration of the fresh evidence, in the form of medical reports and country expert reports, the credibility findings made by the judge in the previous appeal. The flaw in this approach is that there is no basis for knowing what assessment of credibility would have been made by the previous judge had these reports been before her. The previous judge relied on a report by Dr Leggat but this report was not part of the evidence before the Tribunal in the present appeal. I agree with the submissions by Ms Sjøvoll that the reasons given by Judge Horvath for not disturbing the previous credibility findings on the basis of the new reports were wholly inadequate.
- 18) Mr Kingham submitted that the new reports did not deal with risk on return and accordingly, even if the judge's approach to the new reports contained errors, this would not affect the outcome of the appeal. I do not agree with this submission. Before a finding can be made on risk on return in this appeal, it will be necessary to make proper findings on the credibility of the appellant's account. Judge Horvath did not give adequate reasons for the findings made in relation to the assessment of credibility.
- 19) I am satisfied that the nature or extent of any judicial fact finding which is necessary in order for the decision to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the appeal to the First-tier Tribunal, in accordance with Practice Statement 7.2(b). The question the First-tier Tribunal will have to address is whether the account on which the appellant bases his claim for asylum is credible having regard to the evidence now available about the appellant's medical and psychological condition and the conditions in his country of origin. This evidence will include not only the reports before the Upper Tribunal but any up-to-date reports which become available prior to the new hearing. Some time will be required for the preparation of further reports and it would therefore be appropriate for the appeal to be listed for a Case Management Review hearing prior to a substantive hearing.

DECISION

20) The decision of the First-tier Tribunal contains errors on points of law such that it is set aside and will be re-made at a further hearing before the First-tier Tribunal.

Anonymity

21) The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum & Immigration Tribunal (Procedure) Rules 2005.

Signed

Date

Judge of the Upper Tribunal