



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/07715/2016

THE IMMIGRATION ACTS

Heard at Field House
On 29 June 2017

Decision & Reasons Promulgated
On 24 July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

**MOHAMMED ASEEM SAFI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Fitzsimons, Counsel
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal (Judge Fox) dismissing his appeal against the respondent's decision of 11 July 2016 refusing his application for asylum.

Background

2. The appellant is a citizen of Afghanistan who, on his own account, made an unlawful entry into the UK in 2008. He attended the Asylum Screening Unit on 23 July 2008 and claimed asylum. He said that he was aged 15 but an assessment by the local authority concluded that he was an adult and his date of birth was assessed as 1

January 1990. The appellant was released on temporary admission with reporting restrictions but he failed to report and was subsequently listed as an absconder. His asylum claim was treated as withdrawn on 17 October 2008.

3. The respondent next became aware of the appellant on 17 May 2016 when he was found with two other people attempting to leave the UK concealed in a lorry. He was arrested and detained pending his removal. On 24 May 2016, he claimed asylum. The screening interview took place on 13 June 2016 and the substantive interview on 27 June 2016.
4. The basis of the appellant's claim was that he would be at risk of mistreatment on return to Afghanistan as his father had been a commander in charge of a government checkpoint in Afghanistan, whereas a paternal uncle was a member of the Taliban. In 2006 the Taliban attacked the family home and both his parents were killed. His mother was killed instantly by a rocket explosion and the appellant, who was in a room with his brother, sustained injuries. His father was stabbed and shot by the Taliban attackers.
5. For the reasons set out in the detailed reasons for refusal at Annex A of the decision letter of 11 July 2016, whilst the respondent accepted the appellant's identity and nationality, she did not accept that he or his family had had problems with the Taliban in Afghanistan or that he would be of any adverse interest on return. The appellant had relied in support of his application on a rule 35 torture allegation report received on 5 July 2016, noting that he had some scarring on his body. However, it was the respondent's view that the injuries could have been caused in any number of ways and could be every day injuries (para 59 of Annex A). The respondent also took the view that the appellant would be able to look to the authorities in Afghanistan for protection and had failed to demonstrate that they would be unable or unwilling to provide it on return.

The Hearing Before the First-tier Tribunal

6. Before his appeal was heard by the First-tier Tribunal the appellant was referred to the Medical Foundation and a medico-legal report was prepared dated 4 January 2017. In this report 47 scars and lesions his body are recorded and 45 of these are attributed to the injuries sustained during the explosion in the courtyard of his family compound. It was the doctor's view that individually all the scars were consistent with the attribution of multiple cuts caused by flying glass fragments or possible shrapnel after an explosion and, when the lesions were considered as a whole, the scarring was highly consistent with the attribution given. The doctor also considered the appellant's psychological condition and found on examination that he was suffering from PTSD and severe depression and had made two suicide attempts. She found that the physical and psychological findings were consistent with the alleged report of trauma arising from the explosion.

7. The judge heard oral evidence from the appellant and two further witnesses, one who had lived in the same village, and the other a British citizen, who has met and formed a relationship with the appellant.
8. The judge set out his findings at [68]–[131]. He did not find the appellant to be a credible or reliable witness. He said at [114] that the appellant had failed to demonstrate a subjective fear of harm for the reasons he had given and that when the evidence was considered in the round it was reasonable to conclude that the first witness and the appellant's partner had sought to embellish evidence to bolster his claim [113]. The judge considered the medical evidence but found that the conclusions within the expert report were of limited probative value and this included the assessment of PTSD and depression for the reasons claimed by the appellant [94]. The judge's concerns about the medical evidence are set out [78]–[95]. He found that the appellant was not entitled to asylum or humanitarian protection and there were no compelling or exceptional circumstances enabling him to rely on article 8 outside the Rules.

The Grounds of Appeal

9. The grounds of appeal focus solely on the judge's approach to the medical evidence. It is argued that the judge was wrong to criticise the expertise and impartiality of the doctor in circumstances where the Medical Foundation was recognised as having expertise in this particular field. The judge had been wrong to criticise the doctor for failing to assess points of credibility and in particular [78] and [81] inferred that the judge expected the doctor to take a position on both the historic age dispute and the appellant's propensity to give misleading information but these were not matters on which a medical expert was required to comment or resolve. It is further argued that the judge erred by finding that the doctor had relied exclusively on the appellant's own account [92] and that this was not a legally permissible approach to expert opinion: R (on the application of AM) v Secretary of State [2012] EWCA Civ 521. It is further argued that the judge failed to have regard to the medical evidence on the fluctuating nature of PTSD and had erred by criticising the judge for not considering adverse credibility issues when it was plain that she did have regard to such matters.
10. Permission to appeal was granted by the First-tier Tribunal on the basis that the issues raised in the grounds revealed an arguable error in the judge's overall credibility assessment.
11. Ms Fitzsimons adopted the grounds. She submitted that the judge had wrongly criticised the medical evidence by commenting that the expert appeared to resist any possibility that the appellant may be dishonest, failed to engage with any meaningful assessment of his propensity to provide false information or take into account the falsehood about his age. She argued that these were matters for the judge to assess. She submitted that he had failed to take into account, when assessing credibility, the fact that the appellant's injuries were consistent with the evidence he had given about the explosion when his mother was killed and his father attacked. The judge had also failed, so she argued, to take account of the appellant's PTSD and

depression when assessing what weight to attach to matters such as discrepancies in the evidence when assessing credibility.

12. Mr Kotas submitted that it was for the judge to assess what weight to give to the medical evidence. When assessing that evidence, he was entitled to take into account the fact that the doctor had worked on the basis of accepting the appellant's account and not engaging with points which would be relevant when assessing PTSD and depression. The points made by the judge in his assessment of the weight to be attached to the medical evidence were properly open to him. He had identified real problems with the appellant's evidence and it was for him to assess the impact of the medical evidence on the assessment of the appellant's credibility.

Assessment of Whether the Judge Erred in Law

13. I must consider whether the judge erred in law such that the decision should be set aside. The decision in JL (medical records – credibility) China [2013] UKUT 00145 was produced at the hearing and at [70] the judge said that he had considered this authority in his credibility assessment. For the purposes of considering the judge's approach to the medical evidence, it would be helpful to set out the italicised head note to JL (China) which is as follows:

- “(1) Those writing medical reports for use in immigration and asylum appeals should ensure where possible that, before forming their opinions, they study any assessments that have already been made of the appellant's credibility by the immigration authorities and/or a Tribunal Judge (SS (Sri Lanka) [2012] EWCA Civ 155 [30]; BN (psychiatric evidence discrepancies) Albania [2010] UKUT 279 (IAC) at [49], [53]). When the materials to which they should have regard include previous determinations by a judge, they should not conduct a running commentary on the reasoning of the judge who has made such findings, but should concentrate on describing and evaluating the medical evidence (IY (Turkey) [2012] EWCA Civ 1560 [37].
- (2) They should also bear in mind that when an advocate wishes to rely on their medical report to support the credibility of an appellant's account, they will be expected to identify what about it affords support to what the appellant has said and which is not dependent upon what the appellant has said to the doctor (HE (DRC, credibility and psychiatric reports) Democratic Republic of Congo [2004] UKAIT 000321). The more a diagnosis is dependent on assuming that the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it (HH (Ethiopia) [2007] EWCA Civ 306 [23]).
- (3) The authors of such medical reports also need to understand that what is expected of them is a critical and objective analysis of the injuries and/or symptoms displayed. They need to be vigilant but ultimately whether an appellant's account of the underlying events is or is not credible and plausible is a question of legal appraisal and a matter for the Tribunal Judge, not the expert doctors (IY [47]; see also HH (Ethiopia) [2007] EWCA Civ 306 [17]-[18]).

- (4) For their part, judges should be aware that, whilst the overall assessment of credibility is for them, medical reports may well involve assessments of the compatibility of the appellant's account with physical marks or symptoms, or medical condition: (SA (Somalia) [2006] EWCA Civ 1302). If the position were otherwise, the central tenets of the Istanbul protocol would be misconceived, whenever there was a dispute about claimed causation of scars, and judges could not apply its guidance, contrary to what they are enjoined to do by SA (Somalia). Even where medical experts rely heavily on the account given by the person concerned, that does not mean their reports lack or lose their status as independent evidence, although it may reduce very considerably the weight that can be attached to them".
14. The grounds of appeal focus on the criticisms of the judge's treatment of the medical evidence but do not expressly identify how the errors, if established, affect the outcome of the appeal. By necessary inference, and as addressed in the submissions, it is argued that the medical evidence provides support for the factual account given by the appellant so far as the explosion and what has happened to his family is concerned and the diagnosis of PTSD and depression is also relevant to the assessment of his evidence in so far as adverse inferences were drawn about his credibility from discrepancies and on whether his conduct such as failing to pursue his original claim and only claiming asylum after he was arrested when attempting to leave the UK, should be treated as damaging his credibility.
15. The judge's criticisms of the medical evidence set out in his decision at [78]-[91] can be summarised as follows:
- (a) No explanation is offered for the appellant's ability to take pre-emptive action to defend himself against the sudden effects of the explosion despite his claim to be asleep at the time, implying that the effects of the explosion were sufficiently slow to allow the appellant time to cover his face and turn his body away from the blast.
 - (b) There is no reference to any medical report prior to the doctor's interview with the appellant but the doctor concluded that the appellant's vitiligo began at the age of 11.
 - (c) The doctor also concluded that the headaches began in 2008 and it was reasonable to conclude that she relied exclusively on information provided by the appellant to reach these conclusions.
 - (d) In evidence the appellant claimed the expert did not request historic medical records which he would have provided if asked, nor did the expert request further evidence from the partner who provided a witness statement detailing the appellant's suicide attempts. It would be reasonable to expect the doctor to want to satisfy herself of the circumstances surrounding these activities to arrive at a reliable conclusion that the appellant's suicidal ideation was more than fanciful. The judge commented that the doctor said that the appellant had locked himself in the bathroom on the first occasion he attempted to take his

own life, whereas his partner had said that she had discovered the appellant by chance and therefore the door could not have been locked.

- (e) His partner also said that the appellant's suicide attempt was motivated by his situation in the UK but there was no assessment of this evidence despite it being in the doctor's possession.
- (f) The doctor relied upon her assessment of PTSD and depression to explain the inconsistencies in the appellant's claims in 2008 and 2016 but it was reasonable to conclude that the claims in 2008 and 2016 had no credible nexus and the doctor appeared to resist any possibility that the appellant may be dishonest.
- (g) The doctor acknowledged that the appellant provided misleading information to the respondent but failed to engage in any meaningful way with the appellant's persistent propensity to provide false information and the vulnerability of reliable conclusions flowing from such circumstances.
- (h) On the issue of the appellant's claimed age, the doctor did not appear to have taken into account the falsehood arising from the appellant's claim to be a minor when he was assessed as an adult.
- (i) Inconsistent evidence relating to the appellant's departure was dismissed as an error by the interpreter and confusion with the age of the appellant's brother in the report.
- (j) Alleged errors made by the interpreter at a substantive interview were also relied on to explain discrepancies, the appellant saying that he perceived the interview to be hostile despite his legal representative being present and having said that he was satisfied with the interpreter.
- (k) The doctor dismissed the evidence in the first screening interview where the appellant had said that he worked in Pakistan in favour of the appellant's subsequent explanation.
- (l) The doctor appeared to accept numerous deficiencies in the appellant's evidence without appropriate challenge.
- (m) The doctor concluded that the appellant's account of his scars was consistent with the examination and that unusually she was able to date the injuries to the appellant's claimed timescale despite her simultaneous statement that scars cannot be dated beyond six and twelve months after they occur.
- (n) The doctor relied on the appellant's evidence to conclude that he suffered from PTSD and depression. The doctor relied on the headaches which began in 2008 once the appellant arrived in the UK, not taking account of the numerous discrepancies in the credibility of his evidence.

- (o) No explanation was offered for the headaches which did not occur until four years after the alleged trauma which was two years after the appellant had allegedly left Afghanistan.
- (p) There was no meaningful explanation of the evidence relied upon to conclude that the appellant's psychological findings were typical to stress in a cultural or social context and the doctor failed to provide sufficient reasons to explain why his symptoms were unique to his social or cultural background.

16. The judge then went on to say:

"92. For the reasons stated above it is reasonable to conclude that the expert relied exclusively upon the appellant's own account and she has unreasonably disregarded the numerous deficiencies in the available evidence. While she refers to the existence of earlier credibility findings she has failed to engage with the available evidence in any meaningful way.

93. It is reasonable to conclude that the expert report has failed to apply the appropriate level of impartiality. She dismisses evidence that disadvantages the appellant without meaningful consideration. The natural reading of the expert report leads the reasonable observer to conclude that the expert has failed to demonstrate sufficient impartiality to assist the Tribunal.

94. It therefore follows that the conclusions within the expert report are of limited probative value. This includes the assessment of PTSD and depression for the reasons claimed by the appellant".

17. I now turn to the complaints raised in the grounds of appeal. It is argued firstly that there was no basis for a criticism of the expertise and partiality of the expert and that the Medical Foundation is recognised both by the respondent and by the Tribunal as an expert and impartial body. That is the proper starting point although each report must be assessed in the context of the appeal to which it relates. I have been concerned about whether the factors identified by the judge supported his comment that it was reasonable to conclude that the expert report failed to apply the appropriate level of impartiality but the issue is not what I may or may not have concluded but whether it was open to the judge to make such a comment. I am satisfied in the light of the factors he identified that this comment was open to him. In any event, the factors identified by the judge on which he based his comment remain relevant to the assessment of the weight to be attached to the medical report, regardless of what other conclusions may be drawn from them.

18. The grounds then argue that the judge was wrong to criticise the doctor for not going beyond her realm as a clinician by failing to assess points of credibility. It is correct that it is not for the medical expert to assess credibility but to give an opinion based on her expertise on the plausibility or likelihood of the cause of the physical injuries and the presence and cause of any psychological injuries. However, in the context particularly of assessing psychological conditions, the doctor should take into account relevant aspects of the appellant's behaviour and background and if there is

a failure to do so, this is a matter for the judge to consider when assessing the weight to be given to the medical opinion. I do not think that the judge was seeking to fault the doctor for failing to make findings on credibility but for failing to take issues relating to the appellant's credibility into account when assessing the psychological evidence: see BN (Albania) at para 53 as referred to in JL (China) at [13] above.

19. It is then argued that the judge erred by criticising the doctor for exclusive reliance on the appellant's account. The doctor has based her opinion on the account given by the appellant and in this context it may be that the judge expressed himself too strongly in criticising the doctor's failure to consider the discrepancies in the evidence but this does not in itself detract from the judge's comments about the medical evidence or the fact that it was for him to assess the credibility of the appellant's account. The grounds refer to R (AM) Angola where the issue before the Court of Appeal was whether the judge had been entitled to find that there was no independent expert evidence of torture. The Court accepted that a medical opinion could amount to evidence but made clear in [30] of its judgment that a requirement of evidence was not the same as the requirement of proof to the appropriate standard which was a matter of weight and assessment. It was for the judge to assess the evidence and to decide the weight to be given to element in the context of the evidence as a whole.
20. It is then argued that the judge failed to have regard to the medical evidence on the fluctuating nature of PTSD but I am not satisfied that this is so and even if, as the grounds assert, the judge misstated the evidence on this discrete issue, it had no material bearing on the outcome of the appeal. It is also argued that the judge made an unfounded criticism that the doctor failed to consider prior credibility points. There doctor does refer to a number of such issues in her report but the fact remains that it is for the judge to decide what weight to give to the discrepancies.
21. The medical evidence had to be looked in the light of the evidence as a whole and in this context, the judge, when assessing the appellant's credibility, took into account the numerous factors relevant to the credibility assessment in the evidence other than the medical evidence. He found that it was reasonable to expect that, if the appellant had provided a truthful account of his circumstances when he claimed asylum in 2008, he would be able to recall this detail; he had claimed asylum in 2008 and then absconded; the claim had been made in materially different terms from the claim made in 2016; after the claimed explosion in 2004 the appellant had remained in Afghanistan until 2006 and, on his own account, the Afghan authorities had provided protection; he had then been taken by his uncle to Pakistan where he remained until 2008; there were numerous discrepancies in the evidence, at his first screening interview the appellant had said that he had left Afghanistan six or seven years before claimed asylum, which would have been before the 2004 incident. His 2016 claim provided more detail than advanced in 2008 and the appellant failed to provide details in 2008 which were now provided with his present claim. Documents had been produced which were inconsistent with his claim.

22. The judge was also entitled to comment that the Afghan authorities were unable to verify dates with any level of certainty yet they were willing, on the appellant's account, to issue him amended documents and that the absence of original documents did not assist. There were also discrepancies in the evidence about the reason for the appellant's father being admitted to hospital, whether for a gunshot wound or a gunshot wound and a knife wound.
23. The witness who claimed to know the appellant in his home village was unable to provide any meaningful detail including the date or year of the event as claimed. He had also claimed that he was a recognised refugee but that had not been verified with documents which would have been available with relative ease, and he distanced himself from his statement in cross-examination. He had claimed that he advised the appellant to claim asylum whereas the appellant refuted this. His partner also claimed that she was responsible for advising him to claim asylum but the appellant had said that he relied on his own initiative to do so.
24. The judge also considered, as he was required to do, s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 referring to the fact the appellant had entered the UK clandestinely and travelled via safe third countries en route to the UK, claimed asylum on encounter and then absconded. He referred to the evidence relating to the appellant's claimed attempt to reinstate his asylum claim in 2013 and was entitled to note that none of the letters produced on this issue had a letter heading, signature or proof of postage.
25. In summary, whilst the judge may have expressed himself strongly about the medical report, the grounds do not satisfy me that he erred in law. The conclusion in the medical report on the appellant's physical injuries was that they were highly consistent with the appellant's account of the attack on the family compound but that simply provides evidence to support the assertion that there was an attack and an explosion in which he was injured. It does not without more provide support for his claim that it was a targeted attack on his father, still less that he would now be at risk from the Taliban. So far as the diagnostic conclusion that the appellant is suffering from depression and PTSD its relevance to the appellant's account of events and to the assessment of his credibility must be assessed in the light of the whole of the evidence and the judge was entitled to take the view that the medical evidence provided no adequate explanation to offset the conclusions he drew from the other aspects of the evidence summarised at [21] – [24]. His approach to the medical evidence was consistent with the guidance in JL (China).
26. The criticisms raised in the grounds do not satisfy me that he erred in law in such a way that the decision should be set aside. I am satisfied that his findings of fact were properly open to him for the reasons he gave.

Decision

27. The First-tier Tribunal did not err in law such that the decision should be set aside and accordingly the decision stands. No anonymity order was made by the First-tier Tribunal.

Signed: H J E Latter
Deputy Upper Tribunal Judge Latter

Date: 20 July 2017