Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04732/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 February 2018	**On 6 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

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(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. M. Moriarty, Counsel, instructed by Luqmani Thompson & Partners Solicitors
For the Respondent: Mr. D. Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Mozolowski, promulgated on 17 July 2017, in which she refused the Appellant's appeal against the Respondent's decision to refuse a grant of asylum.

2. As this is an asylum appeal, I have made an anonymity direction.

3. Permission to appeal was granted as follows:

> "In the decision the Judge did not refer to the Practice Direction on Child, Vulnerable and Sensitive Witnesses. Following AM (Afghanistan) [2017] EWCA Civ 1123, this can amount to a material error of law."

4. The Appellant attended the hearing. I heard submissions from both representatives following which I reserved my decision.

Submissions

5. Mr. Moriarty relied on the grounds of appeal.

6. Mr. Clarke submitted that the factual matrix of the appeal was not as in AM. The grounds referred to what was set out in 19(c) of AM, but the Judge had engaged wholly with the medical evidence. She was critical of it, but she had engaged properly with it. She had borne in mind that the Appellant was a minor [22], and referred to section 55. She had considered the medical evidence [25]. Her criticisms of this evidence were set out at [26] to [32]. In relation to [26], an expert should include cultural references. At [27] she found that the Appellant had not attended further counselling as it clashed with his college studies. At [28] she noted that the Appellant was not able to give evidence. At [29] she considered fight or flight. She was entitled to find in relation to the Appellant meeting Pashtuns in London that it required a greater leap of faith to get onto the coach. It was not credible that he was prepared to go to a greater unknown given his reasons for leaving his foster carers as set out at [12].

7. The Appellant had used his second ID for a sustained period of time. The Judge considered the plausibility of the Appellant's account in line with the medical evidence. At [30] she accepted that the Appellant had PTSD. The Appellant had had the opportunity of further medical treatment. There was no other evidence before the Tribunal bar the referral to the psychiatrist in 2017. The medical evidence before the Judge was the result of only a two hour assessment.

8. The Judge's treatment of the medical evidence was entirely consistent with the caselaw. Credibility was a matter for the Judge. Expertise in medical matters is for the expert. The expert was not there to test credibility or cross-examine. It was difficult to criticise the Judge given that the expert had had a limited window of only two hours.

9. Mr. Clarke referred to [32]. It was well known from deportation cases that it was traumatic to be separated from parents. I was referred to [37] and [44]. The causation of the mental illness had been examined by the Judge. The expert had not considered attribution to other causes. At [33] no reasons had been given for why the Pashtuns would finance his coach trip. It made no sense that they would have advised him to take another name. At [34] the Judge found that the Appellant had demonstrated cognitive ability, assuming a second identity. The grounds were merely a disagreement with the Judge's findings.

10. In relation to ground 2 this was an argument of substance over form. There was no need to refer expressly to the guidance. The Judge had accepted the Appellant's vulnerability.

11. In relation to ground 3, irrationality was a very high threshold. The grounds misrepresented the Judge's findings. Her finding at [24] was nowhere near to the threshold required for perversity. At [33] she did not find as was stated in the grounds at 4(ii). At [26] she had not made a finding that there was a deep seated belief in the spirit world in his culture, but was asking why the expert had not considered this. The cultural context could be taken into account. It was not a perverse finding and, in any event, it was not material.

12. In relation to [30], she had not found that there was a cultural phenomenon of education taking a higher priority. If anything, this was a favourable finding for the Appellant – there may have been a cultural explanation for why he had not attended counselling.

13. Mr. Clarke accepted that it was wrong for the Judge to make the finding at [38] regarding women only households as no reference had been made to any evidence in support of this finding. However, it was not material. The Judge was considering why the Appellant and his mother had gone to live with their cousins. It made no sense that they would have gone to live there. This was not a material error.

14. In relation to [39], the Judge was entitled to ask whether the Appellant's cousins would really let him stay overnight. It was unusual behaviour in the context of departure from a Taliban home.

15. In relation to [40], the Judge was considering the coincidence of the Appellant's absence at the time of the raid. The cousins were fierce supporters of the Taliban and it could be expected that the police would check neighbouring homes. The Appellant's claim was that he was at risk from the Taliban. The Judge was entitled to find that it was not plausible that the police would not check neighbouring homes when looking for someone they perceived as a terrorist. It was a reasonably drawn inference that the police would not just knock on one door and then leave the area.

16. At [43] it was not just the sale of a piece of land that would take five days. It was all of the matters which the Appellant had said would take just five days. It was not a perverse finding when the logistics of the whole issue were considered.

17. It was open to the Judge to make findings in [38] regarding the sharing of information in families given that the Appellant had lived in the same village as his cousins and the association with the Taliban had gone on for a long time. It was not perverse for the Judge to make these findings. At [34] regarding the journey to London, this was not all that the Judge was

looking at – there were other factors in play including the use of the false name.

18. In relation to the finding at [32] that the expert medical evidence raised more questions than it answered, this was based on a number of factors. The Appellant was receiving no ongoing treatment. The assessment had only lasted two hours. He had chosen to attend college rather than receive more treatment. He had had a traumatic journey to the United Kingdom and had witnessed his father's death. In any event, the Judge had accepted the diagnosis.

19. In response Mr. Moriarty submitted that all three grounds were made out. He referred to paragraph [30] of AM. There was no indication that the Practice Direction had been followed. It had been provided to the Judge in the Appellant's bundle. The decision must identify that the Appellant is vulnerable and there was no indication that the Judge had done that.

20. I was referred to paragraphs [40] to [42] of the medical report. The expert had considered other possible causes. She was better placed than the Judge to reach her conclusions. She had not based her assessment on only two hours with the Appellant, but she had read the documents and had used her extensive experience. She was able properly to diagnose the Appellant. There was no authority from the Judge to show that two hours was not long enough to make a diagnosis. It was not open to the Judge to find that a diagnosis could not be made.

21. In relation to ground 3 he referred only to one specific finding at [40]. The Appellant's case was that he was only looked for by the authorities after they had raided his cousins' house. I was referred to [10] of the decision. When the police raided the house they were not looking for the Appellant. The Judge was not entitled to make the finding at [40]. All of the findings set out in ground 3 were unsupported.

22. The Judge had started out with her own case theory, and had set out to disprove the Appellant's case based on her theory. The Judge had found that the Pashtuns who met him should immediately have identified his mental health issues, but equally found that two hours was not long enough for an expert to diagnose them.

Error of law

23. In relation to ground 2, as the grant of permission made clear, the case of AM held that failure to follow the Practice Direction in relation to child, vulnerable adult and sensitive witnesses can be a material error of law. AM states at [30] "Failure to follow them will most likely be a material error of law."

24. Paragraph 33 of AM sets out [13] to [15] of the guidance as follows:

> "Given the emphasis on the determination of credibility on the facts of this appeal, there is particular force in the Guidance at [13] to [15]:
>
> > "13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.
> >
> > 14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those [who] are not vulnerable, in the context Judgment Approved by the court for handing down. AM (Afghanistan) of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
> >
> > 15. The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and this whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind."

25. The Judge has failed to refer to the Practice Direction at all. She has made reference to section 55 reflecting an awareness of the Appellant's age, and has referred to the Appellant's mental health, but she has not referred to the guidance. Having carefully considered the decision, it is not clear either that she has followed the guidance. This is linked with the Judge's treatment of the medical evidence, and the findings made, as referred to in ground 3.

26. I have given careful consideration to the points made in relation to the medical report. I find that the Judge has erred in her treatment of this report. First I find that she has erred in placing undue weight on the finding that the expert produced the report having assessed the Appellant for only two hours. At [30] she states:

> "I also note from the psychology report that the psychology report was based on a two hour interview with the Appellant. I do not consider that to be sufficient although I do accept that there were concerns that the Appellant may have PTSD as expressed by the Appellant's present children's services department and in fact the Appellant was offered counselling which he declined. This again could be for cultural reasons and because it could well be that the Appellant considered education to have a higher priority. However, I accept that the Appellant has PTSD and a depressive illness, the level of which has not been fully assessed, as a two hour interview would not be likely to give a full picture to a psychologist, especially when there is an overlay of credibility concerns with the Appellant's narrative."

27. At [31] she states:

> "Therefore although the psychology report clearly flags up the Appellant having a mental illness, the degree and the full nature of the mental illness cannot, to my mind be established after only a two hour interview."

28. There are no reasons given, and no authority cited, to justify the finding that an assessment lasting two hours is insufficient for a medical expert to assess an individual's mental state. Further, there is no acknowledgment of the documents that the psychologist had taken into account in making her assessment and diagnosis. I find that the Judge has given weight to her finding that two hours was not long enough to make an assessment without giving any reasons or citing any evidence to justify this finding.

29. Further, I find that no reason or supporting evidence is given for the assertion that the Appellant may not have taken counselling "for cultural reasons".

30. The finding that two hours is insufficient for an expert to make a diagnosis is at odds with the finding at [33] that it would have been "more natural" for the Pashtuns who the Appellant met to have suggested that he seek medical advice rather than advise him as they did. This implies that she considered that they should have been able to assess him as having mental health problems which required medical attention after only just meeting him.

31. In relation to the finding at [32] that the expert had not considered that the traumatic cause of the Appellant's PTSD could be the "horrendous journey" from Afghanistan, the expert had considered causation at [40] to [42] of her report. She states:

> "It is my opinion that the current psychiatric symptoms displayed by Mr O relate entirely to his traumatic past experiences in Afghanistan and en route to the UK, together with his fears for his safety and future if forcibly returned to his native country, as described above.
>
> Mr O reported no other traumatic events of significance, prior to the deaths of his father and siblings, previous difficulties in his earlier life atypical for his cultural context or any familial history of mental illness which would have indicated a different underlying cause to his psychiatric illness (such as a biological disposition).
>
> The current severity and chronicity of Mr O's psychiatric condition is too serious, in my view, to have been caused simply by ordinary issues relating to displacement, even for a minor."

32. I find that the expert's opinion of the cause of the Appellant's PTSD was "his traumatic past experiences in Afghanistan ***and*** en route to the UK" (my emphasis). At [42] she expressly states that his condition is "too serious, in my view, to have been caused simply by ordinary issues relating to displacement, even for a minor". She had considered his journey to the United Kingdom, and had found that this alone was not enough to have been the cause for his trauma. It is wrong for the Judge to state that the expert had not discounted the effect of the journey.

33. A further criticism of the report is at [26] where the Judge states:

> "The Appellant described symptoms which the writer of the psychology report has referred to as hallucinatory phenomenon because the Appellant believed that he saw the spirits of his father, brother and sister. Those could be psychotic features in the form of visual hallucinations (it is entirely unclear whether auditory hallucinations exist). However what has not been ruled out by the psychology report is a possible cultural explanation of a deep seated belief in the spirit world within the Appellant's own culture expressed in concrete terms. I am not satisfied with the psychology report's analysis regarding the possibility of psychotic features."

34. The expert considered this at [26] and [27] of her report. I find that the Judge has failed to provide any evidence to corroborate her claim that there is a "possible cultural explanation of a deep seated belief in the spirit world within the Appellant's own culture". The psychologist has referred to the psychotic symptoms and has given her opinion "based upon the evidence-based literature in the field". She has described them as "hallucinatory phenomena", based on her expertise and the evidence in her field. The Judge has criticised her for this, without giving any supporting evidence for her own claim that Afghans have such a deep seated belief in the spirit world. I find that this is an error, and her criticism of the report on this basis is unfounded.

35. At [32] the Judge states:

> "In the circumstances although I accept that the Appellant has a mental illness, the full nature and severity of it to my mind has not been established and the psychology report raises more questions than it answers."

36. No details are given of the questions the Judge considers to be raised by the report, or how she is qualified to find that it raises further questions. It is also not clear whether the Judge is querying the diagnosis, given that she accepts only that the Appellant has "mental illness". Considering the decision as a whole I find that it is not clear that she does accept that the Appellant has PTSD. While at [30] she states "I accept that the Appellant has PTSD", at [31] she states "he may in fact have PTSD but this requires further assessment". She has not explained what expertise she has to enable her to find that further assessment is necessary to make a diagnosis. At [37] she refers to his "symptoms of PTSD" and at [44] states "I accept that this may have caused PTSD", but she is not consistent in her findings. I find that this adds weight to the submission that she has failed in not taking account of the Practice Direction, and in her approach to the Appellant's vulnerability on account of his mental health.

37. Taking all of the above into account, I find that the Judge has erred in her treatment of the expert medical evidence. I find that this is a material error.

38. I have considered above the finding referred to in ground 3, paragraph 4(iii) where the Judge failed to support her finding of the "deep seated belief in the spirit world" [34].

39. I have also stated above that it was accepted by Mr. Clarke that the Judge had erred at [38] when she stated "I am aware of the phenomenon of women only households in Afghanistan" without reference to any evidence to support this. I find that this is a material error given that it goes to the issue of why the Appellant was living with his paternal cousins, and therefore his perceived association with the Taliban.

40. At [40] the Judge states when considering the raid on the Appellant's cousins' home when the cousins were taken by the Taliban:

> "Further, I would have also expected that in any raid, the Afghan police would have searched other houses if the Appellant were not present and if the police were looking for him. I do not accept ... that any police raid took place."

41. At [9] and [10] the Judge set out the Appellant's account that he believed his cousins had given his name to the police in interrogation, and that the police only searched for him thereafter. However, at [40], when considering the evening on which the Appellant's cousins were taken, the Judge finds that it casts doubt on the Appellant's claim that the police did not search further for him on that night. The Appellant has never claimed that the police were interested in him prior to the raid on his cousins' house. I find that the Judge has failed to give proper attention to the Appellant's account, and has erred in finding that no raid took place partly due to the fact that the police did not search further for the Appellant.

42. I have considered the finding at [43] regarding the amount of time it took the Appellant's mother to sell the land and arrange a people smuggler.

> "To have followed the timeline of the Appellant's narrative, the Appellant's mother sold this land without reference to the Appellant within the five days that the Appellant was hiding in the neighbour's house. I do not consider it to be credible that such large amounts of money sufficient to pay a people smuggler would be so readily available and the land transfers would go through as quickly as the Appellant claimed. People smugglers require time to make arrangements and their fees are substantial."

43. The Judge has not referred to any evidence to support her finding that land transfers would take a longer period of time in Afghanistan, or that it would take longer to find a people smuggler, and for that person to make the arrangements. Without giving any reasons or citing any authority to support her finding that it would take longer, I find that the Judge has erred in making an adverse credibility finding on this basis.

44. I find that the decision involves the making of material errors of law. I have taken account of the Practice Statement dated 10 February 2010, paragraph 7.2. This contemplates that an appeal may be remitted to the First-tier Tribunal where the effect of the error has been to deprive a party

before the First-tier Tribunal of a fair hearing or other opportunity for the party's case to be put to and considered by the First-tier Tribunal. The errors all go to the issue of the Appellant's credibility. Given the nature and extent of the fact-finding necessary to enable this appeal to be remade, having regard to the overriding objective, I find that it is appropriate to remit this case to the First-tier Tribunal.

Decision

45. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.

46. The appeal is remitted to the First-tier Tribunal to be re-heard.

47. The appeal is not to be heard by Judge Mozolowski.

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.

Signed Date 2 March 2018

Deputy Upper Tribunal Judge Chamberlain