



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/07895/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11 April 2018

Decision & Reasons Promulgated
On 17 April 2018

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JBS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Presenting Officer

For the Respondent: Ms L Hirst, Counsel instructed by Duncan Lewis & Co Solicitors

DECISION AND REASONS

1. The appellant, a Venezuelan citizen, came to the United Kingdom in June 2000 at the age of 15 and was granted indefinite leave to remain as the dependant of his mother in December 2001. She is now a British citizen. The appellant had been formally adopted in Venezuela by his step-father at the age of 5 but that process had not been recognised in the United Kingdom. The family had moved here following a natural disaster in their country of origin which had destroyed their home.

2. This appeal finds its origins in the conviction of the appellant on 17 December 2007 of offences concerning the importation of a Class A drug for which he was sentenced to seven years' imprisonment. It led to an automatic deportation order under section 32 of the UK Borders Act 2007 by the Secretary of State signed on 5 February 2010. An appeal against the decision under Section 32(5) of the 2007 Act on Article 8 grounds was dismissed by the First-tier Tribunal for reasons given in its decision dated 5 August 2010 (the first appeal). Permission to appeal to the Upper Tribunal was refused.
3. In response to removal directions set for 13 May 2011, representations were made to the Secretary of State seeking revocation of the deportation order. These were rejected and the claim was certified as clearly unfounded. Medical evidence was subsequently lodged and although the Secretary of State refused to revoke the deportation order, she made a new decision carrying an in-country right of appeal. That appeal was dismissed by a different composition of the First-tier Tribunal (the second appeal) for reasons given in its decision dated 4 January 2013. The appeal had been on grounds under the Immigration Rules and Article 8. Here too an appeal to the Upper Tribunal was unsuccessful; permission was granted but the appeal dismissed for reasons given in a decision dated 4 April 2013.
4. Based on information provided by the Secretary of State in a letter dated 6 February 2015, there was an attempt to persuade the Criminal Case Review Commission to refer the appellant's case to the Court of Appeal on the basis of medical evidence relating to his capacity and fitness to plead but this was refused in January 2015.
5. A further application for revocation of the deportation order based on new evidence (including correspondence from the Criminal Case Review Commission and the report by Dr O'Shea, a consultant psychiatrist in specialist learning disability dated 14 May 2014 together with a report from Amnesty International) was refused by the Secretary of State under paragraph 353 of the Immigration Rules as not amounting to a fresh claim for reasons given in her letter dated 6 February 2015. On 16 March 2016 Jay J (sitting as a judge of the Upper Tribunal) granted an application for judicial review of that decision and ordered the Secretary of State to re-consider her fresh claim determination in the light of his judgment. The Secretary of State did so giving her decision in a letter dated 13 July 2016 to refuse a protection and human rights claim. This gave rise to a third appeal before the First-tier Tribunal which was heard by First-tier Tribunal Judge Griffith on 17 November 2017. She allowed the appeal on humanitarian protection/Article 3 grounds and under Article 8 for reasons given in her decision dated 28 November 2017. In summary she concluded that the appellant had significant difficulties which rendered him a vulnerable adult. Were the support from his wife and parents removed, he would on the basis of evidence from Amnesty International, be at risk of destitution and of exploitation by criminal gangs. If returned to Venezuela, there was a real risk his Article 3 rights would be violated. The appellant would also succeed under Article 8 where the scales would tip in his favour based on his learning disability; he was thus able to show very compelling circumstances over and above those provided for in the Rules.

6. The appellant gave evidence in the first appeal but not at the hearing of the second and third appeals. No medical evidence was before the Tribunal at the first appeal; the appellant's step-father explained his concerns about the appellant's mental age although there had never been any medical assessment.
7. The Tribunal at the second appeal had before it a report by Dr Karen Long, an independent psychological report by Lisa Davies and a medical report from Dr Richard Hillier, a Consultant Psychiatrist in learning disability working for Your Health Care in the London Borough of Richmond. In addition, Dr Hillier gave evidence and was cross-examined. By the time of the third appeal, Dr O'Shea had provided an update on his earlier report in which he addresses questions arising out of the possibility of exaggeration or fabrication of the extent of cognitive impairment and he expressed a view on the probable effect of deportation to Venezuela on the appellant's mental health.
8. A previous partner of the appellant gave evidence at the first appeal. His wife, whom he had married in August 2016, gave evidence at the hearing of the third appeal. They have a son who was born on 24 November 2014. The appellant lives however with his mother and step-father as a condition of his bail from immigration detention.
9. No probation report was provided at the third appeal however we note that a probation officer gave evidence at the hearing of the second appeal. As to the conviction, Judge McGregor-Johnson sentenced the appellant and his co-defendant and included these remarks in his judgment

"You both pleaded guilty to being involved in trying to smuggle some 1.1 kilos of cocaine at 100 per cent purity into this country.

I accept that there were others involved above you in the organisation of this importation, but you both played essential roles.

You, [JBS], were involved in involving others and at least assisted in the organisation of those who were going to travel and the retrieval of the case.

...

As far as you are concerned, [JBS], I am satisfied that having regard to the nature and gravity of the offence, it is appropriate to recommend that when you have served the sentence you be deported."
10. By way of country information there was a volume of material before Judge Griffith including a report by Amnesty International dated 9 December 2014 specifically addressing the circumstances of the appellant.
11. Permission to appeal the decision in the third appeal was granted by UTJ Martin. Her reasons briefly stated as follows

"It is arguable, as succinctly set out in the grounds, that the Judge erred in failing to follow the guidance of Devaseelan [2002] UKIAT 00702 and in finding that a mild learning difficulty crossed the Article 3 threshold when the Appellant had lived independently, studied, worked and married."

12. The grounds of appeal begin with the assertion,
- “The FTTJ has primarily allowed the appeal on the basis that it would be a breach of his Article 3 and Article 8 human rights due to his mild learning disability and the potential consequences. This is despite having two previously dismissed appeals, with the issue of the appellant’s learning disabilities being raised at the previous appeal.”
13. The grounds continue with reference to [63] of the judge’s decision on which it is argued that the judge had erred in deciding that this is a case where she could look at the matter as if a determination had never made. The judge had not made reference to three other categories of learning disability: moderate, severe and profound. There was no evidence that the appellant had ever sought or received any support from the support networks available in the United Kingdom whilst at school as an adult and the decision of the judge made no reference to any medication or specific requirements. As to the bearing the country situation would have, it is argued that the judge had failed to give clear reasons why she reached her conclusions. The judge had erred by relying on a much lower threshold of “not reasonable” or “realistic” regarding ability of family members to relocate and had failed to give clear reasons how the appellant met the particularly high threshold of Article 3 on the basis of his mild learning disability for which assistance would be available in Venezuela.
14. We are grateful to Mr Melvin and Ms Hirst for their submissions, at the conclusion of which we announced that we were satisfied that Judge Griffith had erred in law in failing to take into account the evidence as a whole having departed from the decisions of the previous tribunals. We do not consider however it necessary to set aside her decision because we consider that any properly instructed judge would have reached the same conclusion having regard to the evidence that Judge Griffith had failed to take into account. Accordingly order her decision stands.
15. Our reasons are as follows. The guidance given in *Devaseelan v SSHD* [2002] UKIAT 00702 is not confined to asylum appeals and fact finding by an earlier judge and we consider the final major category described in [41(6)] relevant to this appeal,
- “(6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator’s determination and make his findings in line with that determination** rather than allowing the matter to be re-litigated. ...”
16. Judge Griffith reviews the medical evidence in detail in her decision and as to the weight which she gave that evidence she explained at [63]
- “I attach significant weight to the reports of Dr O’Shea, who explains in clear terms what “mild learning disability” means and how such disability manifests itself in this appellant. It does not appear that the Tribunal when making its decision in 2013 did not have the benefit of such a clear explanation and misunderstood what “mild learning disability” meant in practice for this

appellant. In the circumstances, I consider that this is one of those cases where I can look at the matter as if that determination had never been made.”

17. She continued at [64]

“I have set out above at some length the conclusions reached by Dr O’Shea and I accept them. I rely in particular on the diagnosis set out in his 2014 report, extracts of which I have quoted above. It is clear that the appellant has significant difficulties, rendering him a vulnerable adult. He is able to function at present with the help and devotion of his parents and his wife, and I am satisfied that if that very strong and stable safety net were removed then, as stated in the Amnesty International Report, he is at risk of destitution and of exploitation by criminal gangs.”

18. The fact of there being new and materially different evidence before Judge Griffith as to the appellant’s mental disability and country evidence including the Amnesty Report did not entitle her to simply disregard the evidence that had been given in the past. The task before her was to weigh all the evidence in order to come to a legally correct decision. Prior to considering the new evidence in the appeal she would have been aware from the first appeal when the appellant’s concerns were confined to Article 8 that,

- (i) The appellant had completed his primary education obtaining 5 GCSEs.
- (ii) Although he had indicated in his statement that he had left home when he was 16 and started living with friends he had not left home full-time and had only ever stayed overnight with a few friends, usually after some family argument to give everyone time to cool off.
- (iii) He had a relationship with AG of four years’ standing and that she had played an integral part in his life and they had plans to get married. She had visited the appellant regularly whilst he was in prison. In the light of the courses he had undertaken whilst in prison she did not believe that it would be too difficult for him to find employment.
- (iv) The appellant had obtained education qualifications whilst in prison including the completion of hairdressing and doubleglazing courses.
- (v) The appellant would not be able to cope without his family members and fiancée in Venezuela which he considered a foreign country where he had no relatives and would be alone. The appellant’s step-father had concerns about the appellant having a mental age of some five or six years younger than his actual age.
- (vi) The appellant had an essential role in the organisation of the activity that led to his conviction.

19. The judge would have also been aware from the second appeal of the appellant’s step-father’s concerns regarding the appellant’s development were confirmed in the medical evidence we have already referred to. The report by Dr Hillier summarises the position as follows

“In summary [SB] is a vulnerable adult with a learning disability. He finds it difficult to process information quickly and can find social situations challenging and threatening. [SB’s] personality is one in which he wishes to please others takes the course of less resistance. [SB’s] personality and willingness to please may make it difficult for people to realise that he has a learning disability when they first meet him. Nevertheless, he presents with a significant handicap and limited understanding. He has very limited skills to look after himself and cannot cook or maintain his own finances without a significant level of support from people he can trust. [SB] can find his way around the local community where he is familiar with the road layout but would get lost in an unfamiliar neighbourhood. He is unlikely to hold down paid employment without this being within a supportive context and with the support of his family around him. He is therefore unlikely to be able to fend for himself should he be deported to Venezuela where he has no family, friends or contacts. Such a decision is likely to result in [SB] quickly becoming homeless with no means of support.”

20. Under cross-examination at the second appeal, Dr Hillier was questioned whether it was possible to deliberately score low results on the tests that the appellant had undergone. He did not know the answer as it was not his area of expertise. He gave evidence that he felt the appellant could live independently but in a supported accommodation environment within five years. However, he would not be able to “manage his pay packet or the practical day-to-day things”.
21. Dr Hillier was also asked why the appellant’s learning disability had not been picked up until recently. The only explanation he had was that “families found it difficult to accept that a child was not perfect and was somehow different: they made compensations within the family for difficulties that a child had.” Dr Hillier accepted that he had not checked with the appellant in regard to all the qualifications he had achieved but did feel “that the appellant’s potential was much greater than he was currently achieving”.
22. As to the new medical evidence before Judge Griffith, the first report by Dr O’Shea dated 28 May 2014 explains that he had before him a bundle of documents including prosecution papers relating to the case as well as medical and psychological reports, including the reports by Dr Hillier and Dr Long. His examination was carried out on 12 May 2014 when he conducted a full medical interview and mental state examination. His diagnosis was that BS suffers from a learning disability within the definition of the International Classification of Diseases, 10th edition and that this disability would be regarded as being of mild degree within that classification. His centile scores carried out by Dr Long suggested he is functioning at lower end of the range of mild learning disability by reference to IQ and he concludes

“Accordingly he has significant difficulties in relation to language, processing of information, the ability to weigh information by reference to past events and also has significant learning problems, particularly when taught by instruction rather than by demonstration. In common with many people who have a very committed family and who have learned some social skills and general etiquette within a family setting, [BS] on first meeting comes across as being somebody who is of intellectual functioning. However, it is clear, when one spends any length of time with him, that poor comprehension is a very serious difficulty for him and in many ways he can only

understand issues when they are presented to him as a single premise and also when given sufficient time in order to understand the issues involved and come to a conclusion. ...”

He further considered that

“The diagnosis of learning disability with associated impairments of functioning are lifelong and are as relevant today as they were at the time of his arrest.”

23. A further report by Dr O’Shea dated April 2016 dismisses the possibility that BS was in a position to exaggerate his degree of cognitive impairment in a test of cognitive function. In his opinion such a feat would be “... highly improbable and totally beyond somebody of [BS’s] limited intellectual ability”. He thought it very unlikely to be the case and fabrication became “almost completely improbable”. As to the probable effect of deportation to Venezuela Dr O’Shea observes that the appellant has a “particular difficulty with novel situations and needs to learn new skills and new ways of coping in a tailored person centred and gradual way”. He refers to the appellant’s limited ability in terms of understanding risks and considered the appellant has “a significant impairment of intellectual function which means that he finds it difficult to extrapolate from one situation to another and, therefore, requires constant support and help”. He attributes the appellant’s intellectual impairment as “intrauterine in nature and therefore, lifelong and probably due to the toxic effects of blood alcohol levels in his mother during pregnancy”.
24. Whilst it was open to Judge Griffith to give particular weight to the reports of Dr O’Shea, she was nevertheless required to explain how she factored into her risk assessment the evidence given particularly at the first appeal by the appellant which on the face of it appeared to be at odds in the diagnosis subsequently made. That earlier material indicated that the appellant was able to more or less manage his life and that he had had an organisational role in the activities that led to his conviction. This was sufficient for the Tribunal in the second appeal to reject the evidence of the appellant’s step-father as considerably exaggerated and to lead it to a conclusion that the family would continue to be able to support the appellant during a period of reintegration to Venezuela. The Tribunal did not accept that the appellant would be unable to obtain some kind of manual or unskilled employment and that arrangements could not be made with the assistance of his mother and step-father for the payment of his wages to his landlord if these were concerns. As we emphasised to Ms Hirst in the course of her submissions, it is not the findings by the earlier tribunals that were relevant in the third appeal but the evidence that was before them. Account needed to be had to the evidence as a whole and Judge Griffith ought to have explained how she resolved the tension in the evidence and the weight that she gave to each aspect when reaching her decision on Article 3 grounds and assessing the circumstances over and above those described in paragraphs 399 and 399A with reference to Section 117C of the Nationality, Immigration and Asylum Act 2002. The task before the judge was to decide how well the appellant would be able to function in the light of his diagnosis and the best evidence of that functioning would include how he had managed so far. The judge however appears to have completely ignored these aspects and in our view fell into error.

25. To a considerable extent we have sympathy for the judge who was not well assisted by the Secretary of State in the appeal. The Presenting Officer acknowledged there was no evidence from the Secretary of State addressing the current situation in Venezuela and that there was insufficient evidence to show the high level of violence was enough to entitle the appellant to a grant of humanitarian protection. The appellant had produced some 57 items of country information as to the situation in Venezuela and it was open to the Secretary of State to produce evidence herself if she considered that the appellant with his characteristics would be able to be safely returned. Mr Morley, the presenting officer before Judge Griffith, addressed the tension between the evidence of the appellant's previous behaviour and the current medical evidence but submitted that it was "a matter for the Tribunal" whether the new medical evidence was capable of tipping the balance in the appellant's favour. It is difficult to understand why the Secretary of State appeared to accept at the hearing that it was open to the judge to find in the appellant's favour based on the new medical evidence but now seeks to challenge that approach on appeal. She cannot have it both ways. If there were matters that she did not consider Dr O'Shea had not satisfactorily addressed, it was open to her to raise questions for him to answer before the hearing, a practice quite common when expert evidence is being given as alerted by Jay J in his decision quoted below.
26. We understand the challenge by the Secretary of State to be a rationality one. We are not so persuaded. The error was a failure by the judge to have regard to evidence that was before her was of the kind identified in *R (Iran) v SSHD* [2005] EWCA Civ 982 per Brooke LJ at [6]
- "9. ...
- (ii) Failing to give reasons or any adequate reasons for findings on material matters;
- (iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- ..."
27. Jay J was alive to the tension between the earlier evidence and Dr O'Shea's report when considering the challenge to the fresh claim refusal. At [44] of his judgment he explained,
- "It is quite plain to me that the SSHD is of the opinion that the Applicant's learning disability has been exaggerated by him, and in particular by his step-father, to thwart his removal from the UK. It is this opinion that enables the SSHD to reject Dr O'Shea's assessment as "valid", because they are inconsistent with the "factual history", amount to no more than bare opinion, and constitute nothing new. Furthermore, it is the SSHD's view that Dr O'Shea has based himself entirely on the accounts given to him by the Applicant and his step-father."
28. As to the force of Dr O'Shea's report Jay J observed at [48] to [50],
- "48. However, I remain troubled by the SSHD's approach to Dr O'Shea's report. First, the SSHD should not have referred to it as "merely Dr O'Shea's

opinion". It was expert opinion evidence which needed to be addressed and analysed. Mr Wastell attempted to save this ascription by using different adjectives such as "subjective", but this to me makes very little difference. Secondly, Dr O'Shea has not just relied on what he was told by the Applicant and his father. He carried out his own mental state examination of the former; he has interpreted the findings of the clinical psychologists and explained why in his view confection or exaggeration is unlikely; and, he has explained the likely extent of the Applicant's disability. Given that the 2013 tribunal did not accept Dr Hillier's evidence, albeit in so doing did not directly address the status and reliability of the cognitive tests carried out by others, it would in my judgment be open to another tribunal to reach a different conclusion on this key point having regard to Dr O'Shea's different evidence. To my mind, it is not merely a question of the identity of the messenger changing (I doubt whether that, without more, would be sufficient); the message is different, as well as the reasoning in support of it.

49. In my judgment, what comes across very clearly from paragraphs 170-174 of the SSHD's decision is that she has a low opinion indeed of Dr O'Shea's report. No doubt there are many fresh claim cases where, notwithstanding WM (DRC), the SSHD's personal view, if properly substantiated and reasoned, would clearly justify the conclusion that there would or could be no realistic prospect of success before a tribunal (or, more precisely, would be immune from successful challenge in judicial review proceedings); but in my judgment, this is not one of them - at least, having regard to the reasons given by the SSHD, subjecting those to an anxious scrutiny. In my view, in all the circumstances of the present case, which from my experience is particularly complex and multi-faceted, the SSHD has not properly explained why the Applicant's case, including Dr O'Shea's evidence, has no realistic prospect of swaying an independent appellate tribunal.
50. There is no indication that the SSHD has sought expert evidence of her own, either to assist her in interpreting the expert reports of others, or directly in relation to the Applicant. Although the SSHD can act rationally without obtaining such evidence, she does leave herself potentially exposed when it comes to a very close examination of what Dr O'Shea has said and the reasons for it."

29. With the greatest respect we agree with this assessment of the evidence. The reports from Dr O'Shea read with the earlier medical evidence were comprehensive and overwhelming in their effect. This evidence served entirely to explain why the appellant was able to function under supervision but nevertheless suffered from the difficulties identified. Given the evidence about Venezuela which the Secretary of State did not challenge in any meaningful way, the result of the appeal was inevitable. Closer attention to the earlier evidence would not in these circumstances have affected the result; there could have only been one answer, which is for the appeal to be allowed under Article 3. Accordingly, although we have found error by Judge Griffith, we do not consider it requires her decision to be set aside and as indicated above it will stand.

NOTICE OF DECISION

The appeal by the Secretary of State in the Upper Tribunal is dismissed.

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 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.

Signed

Date 16 April 2018

A handwritten signature in blue ink, appearing to read 'Dawson', with a long horizontal stroke extending to the right.

Upper Tribunal Judge Dawson