Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11195/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 19 July 2019	**on 2 August 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KM
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Moriarty instructed by M & K Solicitors.
For the Respondent: Miss Isherwood Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Beach ('the Judge') promulgated on 5 May 2019 in which the Judge dismissed the appellant's appeal on protection and human rights grounds.

Background

2. The appellant is a citizen of Pakistan born on 15 June 1991 who entered the United Kingdom lawfully as a Tier 4 (General) Student Migrant on 25 December 2011. On 10 October 2016 the appellant was recorded as an absconder. On 4 April 2017 the appellant claimed asylum which was refused on 19 October 2017. The challenge to the refusal was the appeal before the Judge.

3. The Judge sets out findings of fact from [30] of the decision under challenge setting out primary findings between [31 – 40] and findings in the alternative between [41 – 45].

4. At [40] the Judge writes:

> "40. I find that the appellant did face problems in 2009 and 2010 as a result of his relationship with MB but that these problems ceased at the end of 2010. I find that the appellant no longer faces any threats from MB's husband and family and that he was able to live safely in Pakistan between 2010 and December 2011 when he left Pakistan. I find that the evidence is not sufficient to show that the appellant has faced threats in the UK and that there was no evidence to show that there is any ongoing threat to the appellant."

5. The finding in the alternative was that even if the Judge was wrong in rejecting the claim at [40] there is a sufficiency of protection and viable internal relocation option available to the appellant.

6. The appellant sought permission to appeal asserting a failure to apply the Joint Presidential Guidance Note No. 2, 2010, that adverse credibility findings are not adequately reasoned, and that the Judge failed to give adequate reasons for findings on material matters, as more fully set out in the grounds seeking permission to appeal.

7. Permission to appeal was granted by another judge the First-tier Tribunal on 18 June 2019, the relevant section of which is in the following terms:

> "3. It is arguable that the Judge failed to direct himself in accordance with the Joint Presidential Guidance Note No. 2 of 2010 or to have regard to **AM (Afghanistan) v SSHD [2017] EWCA Civ 1123**. The Appellant relied on a psychiatric report at p3-16 of his supplementary bundle and had been diagnosed with PTSD. It is arguable that this affected the findings on the Appellant's credibility."

Error of law

8. Although a number of documents were provided late and there is no reference in the appellants skeleton argument to the psychiatric report, precisely because that document was drafted before receipt of the up-to-date medical evidence, it is clear that psychiatric evidence was before the Judge.

9. There is no dispute in the manner in which the appeal was conducted; the challenge being to the way in which the Judge assessed the evidence in light of the appellants accepted vulnerability.

10. At [22] the Judge specifically refers to the fact the Presenting Officer did not challenge the diagnosis rather claiming that the account given in the report was a hearsay account of events and relied upon a number of other evidential matters of concern to the respondent.

11. Ground 1 of the Grounds of Appeal drafted by Mr Moriarty is in the following terms:

> "8. It is noted that FtTJ Beach's determination confirms at [22] that Mr Mavarantonis (who represented the SSHD) did not challenge the diagnosis in the expert psychiatric report. Accordingly, there was no dispute that the Appellant was a vulnerable witness, as stated in the skeleton argument that was submitted on his behalf.
>
> 9. Notwithstanding the above, the FTT determination makes no mention at all of the Joint Presidential Guidance Note No.2 of 2010: or the case of *AM (Afghanistan) v SSHD [2017] EWCA Civ 1123*, which confirms as follows:
>
> *a. given the gravity of the consequences of a decision on asylum and the accepted inherent difficulties in establishing the facts of the claim as well as future risks, there is a lower standard of proof, expressed as a 'reasonable chance', 'substantial grounds for thinking' or 'a serious possibility';*
>
> *b. while an assessment of personal credibility may be a critical aspect of some claims, particularly in the absence of independent supporting evidence, it is not an end in itself or a substitute for the application of the criteria for refugee status which must be holistically assessed;*
>
> *c. the findings of medical experts must be treated as part of the holistic assessment: they are not to be treated as an 'add-on' and rejected as a result of an adverse credibility assessment or finding made prior to and without regard to the medical evidence;*
>
> *d. expert medical evidence can be critical in providing explanation for difficulties in giving a coherent and consistent account of past events and for identifying any relevant safeguards required to meet vulnerabilities that can lead to disadvantage in the determination process, for example, in the ability to give oral testimony and under what conditions (see the Guidance Note below and JL (medical reports – credibility) China [2013] UKUT 00145 (IAC), at [26] to [27]);*
>
> *e. an appellant's account of his or her fears and the assessment of an appellant's credibility must also be judged in the context of the known objective circumstances and practices of the state in question and a failure to do so can constitute an error of law; and*

f. in making asylum decisions, the highest standards of procedural fairness are required.

10. In light of the fact that the above findings were relied upon in A's skeleton argument, it is submitted that FtTJ Beach's failure to incorporate either Guidance Note No.2 of 2010 or these fundamental principles in her assessment of A's credibility of itself 'will most likely be an error of law', as confirmed in AM (Afghanistan) v SSHD [ibid] at [30]-[33]."

12. In [30-33] of *AM* the Court of Appeal found:

"30. To assist parties and tribunals a Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. In addition, joint Presidential Guidance Note No 2 of 2010 was issued by the then President of UTIAC, Blake J and the acting President of the FtT (IAC), Judge Arfon-Jones. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law. They are to be found in the Annex to this judgment.

31. The PD and the Guidance Note [Guidance] provide detailed guidance on the approach to be adopted by the tribunal to an incapacitated or vulnerable person. I agree with the Lord Chancellor's submission that there are five key features:

a. the early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing through the use of a CMRH or pre-hearing review (Guidance [4] and [5]);

b. a person who is incapacitated or vulnerable will only need to attend as a witness to give oral evidence where the tribunal determines that "the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so" (PD [2] and Guidance [8] and [9]);

c. where an incapacitated or vulnerable person does give oral evidence, detailed provision is to be made to ensure their welfare is protected before and during the hearing (PD [6] and [7] and Guidance [10]);

d. it is necessary to give special consideration to all of the personal circumstances of an incapacitated or vulnerable person in assessing their evidence (Guidance [10.2] to [15]); and

e. relevant additional sources of guidance are identified in the Guidance including from international bodies (Guidance Annex A [22] to [27]).

32. In addition, the Guidance at [4] and [5] makes it clear that one of the purposes of the early identification of issues of vulnerability is to minimise exposure to harm of vulnerable individuals. The Guidance at

> [5.1] warns representatives that they may fail to recognise vulnerability and they might consider it appropriate to suggest that an appropriate adult attends with the vulnerable witness to give him or her assistance. That said, the primary responsibility for identifying vulnerabilities must rest with the appellant's representatives who are better placed than the Secretary of State's representatives to have access to private medical and personal information. Appellant's representatives should draw the tribunal's attention to the PD and Guidance and should make submissions about the appropriate directions and measures to be considered e.g. whether an appellant should give oral evidence or the special measures that are required to protect his welfare or make effective his access to justice. The SRA practice note of 2 July 2015 entitled 'Meeting the needs of vulnerable clients' sets out how solicitors should identify and communicate with vulnerable clients. It also sets out the professional duty on a solicitor to satisfy him/herself that the client either does or does not have capacity. I shall come back to the guidance to be followed in the most difficult cases where a guardian, intermediary or facilitator may be required.
>
> 33. 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 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."”

13. The Judge is criticised for failing to set out in the determination an explanation for how the appellant’s vulnerability has been factored into the weight to be given to the appellant’s credibility or the weight to be given to the evidence. It is also argued the Judge did not adequately consider the psychiatric issues.

14. It is also noted that at [36] the Judge finds:

> "36. Even if the appellant did not feel able at that time to tell Immigration (and I can see no reason why he should not have been able to do so) about his problems in Pakistan, he at no stage thereafter (until April 2017) informed Immigration of why he did not wish to return to Pakistan despite reporting for a number of months and knowing that he was at risk of removal from the UK having been served with documents which confirm this."

15. There is no indication that in making such an adverse finding any regard was taken the appellant's psychiatric presentation and inadequate or no reasoning is provided for why the Judge concludes the appellant should not have been able to disclose the information at the relevant time.

16. Mr Moriarty is correct when referring to the fact that there is no reference in the decision to either the Presidential Guidance on the assessment of evidence from vulnerable witnesses or mention of or specific application of the principles set out in the above case law. It is therefore not possible to ascertain whether the Judge did apply relevant guidance when assessing the weight to be given to the appellants evidence or, even if the same was in the Judge's mind, how such weight was assessed in light of the appellant's vulnerability.

17. As it is not clear an appropriate assessment of the evidence was made it is not established the Judge's findings are sustainable. Accordingly the determination shall be set aside with no preserved findings and the appeal remitted to the First-tier Tribunal sitting at Taylor House to be considered afresh by a judge other than Judge Beach who shall give proper consideration to the appellants vulnerability.

Decision

18. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to Taylor House to be heard afresh by a judge other than Judge Beach.**

Anonymity.

19. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed…….
Upper Tribunal Judge Hanson

Dated the 29 July 2019