



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

Appeal Number: PA/13569/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 8 March 2019**

**Decision & Reasons Promulgated
On 26 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

**M R A
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Georget of Counsel

For the Respondent: Mr Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan. He said he was born in 1978.
2. He appealed against the respondent's decision dated 7 December 2017 to refuse asylum, humanitarian protection and on human rights grounds.
3. Judge Freer (the judge) dismissed the appeal in a decision promulgated on 25 October 2018. He did not find the appellant to be a credible witness regarding events in his own country. The judge found he would not be at risk on return and that the respondent's decision was proportionate as regards Article 8.

4. The grounds claim the following:

“The judge incorrectly stated the appellant’s claim at [2] and [8](6) that the appellant had participated in an attack which killed many people. What the appellant said was that he had never been involved in any such attack, rather, that he had been accused of the same. The judge used that inaccuracy as a basis of finding at [68] that the appellant would on his own account be excluded from the Refugee Convention as a result.”

5. Further, the judge erred in finding that the appellant’s claim to humanitarian protection was based on the killing of government members. See [49] of the decision. At [70] the judge explained his reasoning for finding that the appellant was not entitled to humanitarian protection by stating that he “... *has not been shown to have killed any members of the government or to be a wanted ex-Taliban*”. That contradicted the reasoning and fundamentally misstated and misunderstood the basis for the appellant’s claim to humanitarian protection.
6. The claim to humanitarian protection was put on the basis of the appellant’s mental health and the country information as considered in **AS (safety of Karbul) Afghanistan CG [2018] UKUT 00118 (IAC)** and recent UNHCR guidelines. Whilst the judge accepted such evidence as favourable to the appellant’s Article 3 and 8 claims at [71] – [84] because of inadequate reasoning, it was not clear why such evidence was not considered relevant to the appellant’s claim to humanitarian protection under 339C.
7. The grounds claim that the judge’s finding at [35] that PTSD was no longer a problem was perverse. The finding appeared to be based upon a reference in the Southwark MHA November 2017 to his PTSD as historic as opposed to current. See [21] and [23]. The MHA assessment was conducted by John Webster (see page 12 of the appellant’s bundle) whose subsequent witness statement of 15 January 2018 at [4] referred to the PTSD as a current diagnosis. Whereas the judge gave great weight to Mr Webster’s evidence at [28] he appeared to have failed to appreciate that Mr Webster was the author of the Southwark assessment.
8. Further grounds claim that the judge gave no adequate direction upon the meaning of PSG in terms of being in need of international protection on the basis of membership of a particular social group. The judge’s decision that the Refugee Convention was not engaged for want of a Convention reason was focussed upon whether the appellant had suffered past persecution in Afghanistan. See [65]. That was itself an error of law as the appellant did not need to have been the victim of past persecution.
9. Judge Shimmin granted permission on 20 November 2018. He said *inter alia* as follows:

“2. Ground 1 (paras 5 and 6) argues that the judge had misunderstood the evidence in respect of the participation

by the appellant in an attack which killed many people and this led to the judge excluding the appellant from the Refugee Convention. It is arguable that the judge has been contradictory in the findings made (decision paragraphs 68 and 70) and that inadequate reasons have been given in respect of the judge's findings in relation to Article 15(c).

3. *Ground 2 (paras 7 and 8) argues that the judge has failed to make a proper consideration of the evidence relating to the appellant's mental health and to have made a misdirection of law in relation thereto. This ground is material and arguable.*
4. *Ground 3 (para 9) argues that the judge has made an erroneous assessment of the newspaper article submitted by the appellant and this constitutes a material and arguable error of law."*

Submissions on Error of Law

10. Mr Georget clarified the grounds and relied upon his skeleton argument dated 11 January 2019. The issues were briefly that having found the circumstances of the appellant's mental health and risk of suicide gave rise to breaches of Article 3 and Article 8, the judge erred by failing to go on to consider whether the appellant was entitled to humanitarian protection on the basis of those same facts and wrongly excluded the appellant from the Refugee Convention on the basis of inconsistent findings and further, by misdirecting himself as to the question of whether mental health could properly constitute a PSG in law. Mr Georget submitted that the judge ought to have gone on to allow the appeal under the Refugee Convention and/or the Qualification Directive (humanitarian protection) on the basis of those same circumstances.
11. Mr Lindsay relied upon his skeleton dated 22 February 2019. As regards Article 15(c), the Qualification Directive claim, the leading authorities for the case now advanced by the appellant, that is, a medical claim, including **N** and **Bensaid** were referred to by the Secretary of State in the decision letter dated 7 December 2017 at [103]-[110]. The appellant did not meet the high threshold set out in those cases to demonstrate a right to remain in the UK.
12. Mr Lindsay took issue with the appellant's contentions at [8] of Mr Georget's skeleton which did not accurately reflect the judge's reasons. The Qualification Direction point fell away.
13. The appellant contended that the judge found there would be "*an absence of any access to support or treatment*" on return. In fact, the judge found at [78] that the appellant "*can have limited support at best from his parents or he can in theory be a patient in hospital but not both*". There was no challenge to the conclusion that the appellant could in principle access treatment as an in-patient at a psychiatric hospital in Kabul on

return. See [106] of the decision letter. Given the presence of such treatment facilities in Kabul, and the lack of any evidence that the appellant would not reasonably be able to access the same, any argument under the Qualification Directive had no realistic prospect of success.

14. The appellant contended at [8] of Mr Georget's skeleton that the judge had reached a "*stark*" finding that the appellant "*would likely either be chained to a shrine or be forcibly sedated with opium*". In fact, the judge noted at [76] that there had been reports of **isolated incidents** (my emphasis) of people with mental health conditions being chained to shrines. At [77] the judge clearly did no more than speculate on the "*hypothetical act of chaining such a person to a shrine*".
15. Mr Lindsay submitted that none of that could be characterised as findings. The judge explicitly concluded at [77] that "*there is no evidence to show which outcome of the two is the more likely or to what extent when measured in numbers. Quantitative evidence is vital*". Mr Lindsay submitted that that could only be construed as a finding that the appellant had failed to prove to the requisite standard (that of a real and substantial risk) that such treatment might befall him on return.
16. The judge noted at [62] that there remained significant conflict in the evidence regarding the extent and duration of the appellant's health conditions, finding that was "*strongly inconsistent*" with his asylum claim. Mr Lindsay submitted that the same inconsistency must on the findings militate equally against any claim under the Qualification Directive.
17. As regards the Refugee Convention and Mr Georget's submission that the appellant was part of a particular social group, Mr Lindsay submitted that the appellant's mental health problems set out at [104] of the decision letter did not establish that any of the appellant's conditions were immutable characteristics. The Upper Tribunal noted in **TD and AD (Trafficked women) CG [2016] UKUT 92** at [145] that "*about half of adults who suffer from PTSD can recover within about three months. Others may suffer symptoms for as long as 50 years.*" In any event, no evidence had been presented to support an argument that PTSD could ever amount to a permanent, lifelong and/or incurable condition. Mr Lindsay relied upon the same point with regard to depression and anxiety, both of which are expressed as "*recurrent*", implying that they both come and go. The judge was entitled to find that the appellant's mental health difficulties did not amount to an immutable characteristic and that the appellant was not part of any particular social group.

Conclusion on Error of Law

18. It is correct that the judge erred in saying the appellant had taken part in an attack rather than he was perceived as doing so, however I do not find the error to be material. The judge took no adverse credibility point with regard to that issue; he had no need to do so given the other extensive adverse credibility findings he made. All the judge said at [68] was that if

he had been a member of the Taliban who killed many people the appellant would have been excluded from the Refuge Convention for that alternative reason, aside from the overall lack of credibility of the claim. The judge went on to say that there was not a shred of evidence that the appellant had been prosecuted in his absence or would still be of any interest on return.

19. I do not accept that the appellant has made out his claim that the judge erred with regard to the Qualification Directive under either Article 15(b) or (c). There are treatment facilities open to the appellant in Kabul. The appellant could in principle access treatment as an in-patient at a psychiatric hospital in Kabul on return. There is no evidence that he would not reasonably be able to access the same.
20. It is a misreading of the judge's decision at [76] and [77] to suggest that he would "**likely** (my emphasis) *either be chained to a shrine or forcibly sedated*". As regards the 1951 Convention, Mr Georget was unable to demonstrate how or in what circumstances, the appellant's mental health issues amounted to an immutable characteristic such as to come within a particular social group.
21. It is a misreading of the UNHCR guidelines to suggest that the appellant's own particular circumstances come within the following:
"UNHCR considers that depending on the individual circumstances of the case, persons with disabilities, including in particular persons with mental disabilities, and persons suffering from mental illnesses may be in need of international refugee protection on the basis of a well-founded fear of persecution at the hands of non-state actors for reasons of membership of a particular social group or other relevant Convention grounds, combined with the general inability of the state to provide protection from such persecution."
22. The judge carried out a careful, sensitive analysis. His findings with regard to Article 3, regarding which he allowed the appeal, could be described as generous. The judge did not err and his decision shall stand.

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 21 March 2019

Deputy Upper Tribunal Judge Peart