



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08380/2019

THE IMMIGRATION ACTS

Heard at Field House (via MS Teams)
On 25 May 2021

Decision & Reasons Promulgated
On 22 June 2021

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

MAA (AFGHANISTAN)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Aziz, instructed by Rashid & Rashid Solicitors

For the Respondent: Ms Petterson, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is an Afghan national who was born on 1 January 1977. He appeals, with permission granted by the First-tier Tribunal (Judge Haria) against Judge Shore's decision to dismiss his appeal on protection and human rights grounds.

Background

2. As recorded by Judge Shore (hereafter “the judge”) at [3]-[7] of the decision under appeal, the appellant has a long immigration history. He first claimed asylum in the UK on 31 July 2002. The application was refused, an appeal was dismissed, and the appellant became appeal rights exhausted in February 2003.
3. The appellant then made two human rights applications, both of which were based on his relationship with a settled spouse. The first was refused. The second was also refused but an appeal against that decision was allowed and the appellant was granted discretionary leave to remain from 9 October 2006 to 9 October 2009. The appellant applied for further leave but that application was withdrawn.
4. The appellant seemingly applied for a visit visa in November 2010 but that application was refused in December that year. He is said to have left the UK in 2013. In 2017, the appellant attempted to enter the United Kingdom after leaving a flight at Heathrow Terminal Three. He was refused entry, whereupon he sought asylum again. Those further submission were accepted to amount to a fresh claim under paragraph 353 of the Immigration Rules.
5. The appellant claimed, in summary, that he was at risk of kidnapping and ill-treatment upon return to Afghanistan. He stated that he had been kidnapped and held for three years after he had returned to Afghanistan. He claimed that he had been ill-treated at this time, sustaining injuries including a broken skull, and that he had only been released upon his family paying a \$100,000 ransom. Some time later, the appellant left Afghanistan again, and arrived in the UK in November 2017.
6. In her decision, the respondent noted that the appellant’s previous asylum claim (which concerned an asserted fear of the Northern Alliance) had been found to be untrue by Mr Birkby, an Adjudicator, in 2003: [17]-[18]. For reasons she gave at [26]-[31], the respondent considered that the appellant had fabricated his account of having been kidnapped on return to Afghanistan. The respondent did not accept that any part of Afghanistan (including the appellant’s home province of Logar) was experiencing such high levels of indiscriminate violence that the appellant required humanitarian protection: [51].
7. In any event, the respondent considered that the appellant could safely and reasonably relocate to Kabul: [71]. The respondent did not accept that the appellant would be at risk on return to Afghanistan as a Westernised person: [92]-[110]. For reasons she gave at [125]-[169], the respondent did not accept that the appellant’s removal would be in breach of Article 8 ECHR, as she did not accept that the appellant had a genuine and subsisting relationship with his wife or his son. Nor did she consider that

the appellant's mental health was such that his removal would be in breach of Article 3 ECHR: [176]-[194].

The Appeal to the First-tier Tribunal

8. The appellant appealed to the FtT. The grounds of appeal were largely pro forma but it was appreciably clear that the appellant relied on protection and human rights grounds.
9. The appeal came before the judge, sitting remotely, on 18 December 2020. The appellant was represented by counsel, the respondent by a Presenting Officer. The judge heard oral evidence from the appellant and his wife and submissions from the advocates before reserving his decision.
10. In his reserved decision, the judge rejected the appellant's account of having been kidnapped, held and ill-treated because he considered there to be a range of difficulties with that account: [25.8]-[25.18]. The judge did not accept that the appellant enjoyed a genuine and subsisting relationship with either his wife or his child, again due to a range of specified difficulties with that account: [25.19]-[25.29]. The judge concluded, therefore, that the appellant's return to Afghanistan would not place the United Kingdom in breach of its obligations under the Refugee Convention, the Qualification Directive or the ECHR.

The Appeal to the Upper Tribunal

11. The grounds of appeal were settled by the appellant's solicitors. There are said to be three grounds, although there are in fact four, which may be summarised as follows:
 - (i) The judge erred in law in deciding to attach no weight to a report which had been prepared pursuant to rule 35 of the Detention Centre Rules 2001.
 - (ii) The judge had given no consideration to the statements prepared for the appeal by the appellant's wife and son and had accordingly left material evidence out of account.
 - (iii) The judge reached irrational findings on the appellant's asylum claim.
 - (iv) The judge erred in failing to undertake any proper assessment of the best interests of the appellant's son.
12. In his admirably concise submissions before me, Mr Aziz submitted that the judge had erred in failing to take the rule 35 report of Dr Sayed into account. The report showed the location of the appellant's scaring. It was not relevant, Mr Aziz submitted, that the report did not comply with the Istanbul Protocol because it had been commissioned by the respondent.

The report showed the injuries to be consistent with the appellant's claim. It had also been relevant to the question of whether or not the appellant should have been treated as a vulnerable witness under Presidential Guidance Note 2 of 2010. Mr Aziz could not state whether counsel who represented the appellant before the FtT had made an application for the appellant to be treated as a vulnerable witness but it was clear, he said, that the rule 35 report was a 'huge part' of the appellant's case, which was relevant to the assessment of his injuries and his state of mind at the hearing and when he was interviewed by the respondent.

13. As for ground two, Mr Aziz stated that the appellant's wife's evidence and the supporting evidence of the relationship had been improperly discounted by the judge. The appellant had been unable to gather further documents for the appeal due to his mental state. Mr Aziz submitted that the judge had also erred in failing to take account of background evidence concerning the treatment of Westernised people in Afghanistan.
14. Ms Petterson submitted that the rule 35 report was very brief and specifically stated that it was not a medico-legal report. The judge was entitled to discount it for the reasons he gave. The report had been prepared in 2017 and there was no more recent medical evidence whatsoever, whether of a physical or mental health focus. It was apparent that counsel before the FtT had not applied for the appellant to be treated as a vulnerable witness.
15. The judge had been entitled, Ms Petterson submitted, to find the appellant incredible for the reasons he had given, one of which was the lack of supporting evidence about the family's ability to raise the sum of \$100,000 for the appellant's release. The judge had also taken into account the fact that some of the documents positively undermined the appellant's account. The judge had, in sum, considered all of the relevant evidence and had come to sustainable conclusions upon it. The wife's evidence had clearly been taken into account. There were adequate reasons throughout.
16. In response, Mr Aziz submitted again that the rule 35 report did not need to comply with rule 35 because it had been prepared by a doctor at the detention centre.
17. I reserved my decision.

Analysis

18. The grounds are unmeritorious and I find that the judge did not err in law in reaching his decision in this appeal. My reasons for that conclusion are as follows.
19. The first ground criticises the judge for refusing to attach weight to a report prepared by Dr Sayed when the appellant was detained following

his arrival to the UK in 2017. The report was prepared in compliance with rule 35 of the Detention Centre Rules 2001, which currently¹ provides materially as follows:

35. – Special illnesses and conditions (including torture claims)

- (1) ...
- (2) ...
- (3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.
- (4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.
- (5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care.
- (6) For the purposes of paragraph (3), "*torture*" means any act by which a perpetrator intentionally inflicts severe pain or suffering on a victim in a situation in which –
 - (a) the perpetrator has control (whether mental or physical) over the victim, and
 - (b) as a result of that control, the victim is powerless to resist.

20. Dr Sayed's report is five pages long. The first states that it is prepared under rule 35(3) and gives the appellant's details. The second gives the appellant's prison number followed by the following pro forma statement:

I have examined the detainee named above in my capacity as an immigration removal centre medical practitioner and hereby report that I have concerns that the detainee may have been a victim of torture. This is a factual report rather than a medico-legal one.

21. The third page contains an instruction to the doctor about completing the pro forma report. The completed box contains the following:

History in Urdu. He was kidnapped by a gang for ransom in Logar, Afghanistan. He was kidnapped in 2013 and was held

¹ Rule 35 was amended by the Detention Centre (Amendment) Rules 2018/411, so as to include the definition of torture which now appears at rule 35(6).

for 3 years before his family paid money to have him released – a sum of 100,000 dollars. He was kept in a small area under the ground with no light. He was beaten with punches and kicks and sticks. He was also burnt. He claims he cannot sleep since he has been brought to detention. He was treated at Al Shife Hospital in Kabul after being released.

22. The fourth page contains a body map on which Dr Syed has marked a single blunt trauma scar at the rear of the appellant's head (the occiput) and a single burn scar on his right buttock. Page five contains further instructions to the examining physician, after which there is the following:

On examination he has scars consistent with the history given. He also suffers with back pain – since the attack. His symptoms of depression and anxiety have increased in detention. He is experiencing flashbacks and nightmares in detention.

23. What the judge said about this report is to be found at [25.11] of his decision, which is as follows:

I find that the appellant has failed to show to the lower standard that he was regularly kicked and punched by his captors. I make this finding because I do not find that the report of Dr Sayed dated 14 December 2017 to be an expert report that I can give any weight to. It does not comply with the requirements for an expert medical report. There is no CV of Dr Sayed and I cannot assess whether they have any relevant experience or expertise. The assessment of the scarring is not made by reference to the established standards of the Istanbul Protocol.

24. The grounds of appeal suggest at that the judge failed to take Dr Sayed's report into account. That is plainly not the case. Mr Aziz therefore contended that the reasons given by the judge for rejecting the report were inadequate, particularly when it is recalled that the report is prepared by a doctor at the respondent's request.
25. With respect to Mr Aziz, who did not draft the grounds, this is a hopeless submission. As the judge clearly explained, the report fell a long way short of providing expert evidence which could properly corroborate the appellant's account. It specifically stated that it was not a medico-legal report. There was no indication in the report that Dr Aziz had any particular experience or expertise in examining scarring for this (or any) purpose. The report was not addressed to the Tribunal. It contained no statement of truth.
26. Fundamentally, however, the major problem with the report, as identified by the judge, is that it did not purport to apply the Istanbul Protocol, the

importance of which has been underlined in an array of decisions of this Tribunal and the Court of Appeal, including *SA (Somalia) v SSHD* [2006] EWCA Civ 1302; [2007] Imm AR 236. Reference was also made to the Protocol by Lord Wilson in *KV (Sri Lanka) v SSHD* [2019] UKSC 10. In *SA (Somalia)*, the President of the Family Division (with whom Brooke and Moore-Bick LJ agreed) said:

In any case where the medical report relied on by an asylum seeker is not contemporaneous, or nearly contemporaneous, with the injuries said to have been suffered, and thus potentially corroborative for that very reason, but is a report made long after the events relied on as evidence of persecution, then, if such report is to have any corroborative weight at all, it should contain a clear statement of the doctor's opinion as to consistency, directed to the particular injuries said to have occurred as a result of the torture or other ill treatment relied on as evidence of persecution. It is also desirable that, in the case of marks of injury which are inherently susceptible of a number of alternative or "everyday" explanations, reference should be made to such fact, together with any physical features or "pointers" found which may make the particular explanation for the injury advanced by the complainant more or less likely.

27. On any proper view, the rule 35 report did not comply with these requirements. All that was said by the doctor was that the scars were 'consistent with the history given', without any consideration of the individual marks themselves or any assessment of whether they might have been caused by an 'everyday' injury. If the word 'consistent' was used in the sense intended in the Istanbul Protocol, then that was in any event merely a neutral indication which simply meant that the physical signs did not contradict the appellant's account; it did not positively support or corroborate that account in the manner suggested by Mr Aziz: *MN & IXU v SSHD* [2020] EWCA Civ 1746; [2021] 1 WLR 1956, at [103]-[104].
28. Nor is there any merit in the submission that the judge should have treated the appellant as a vulnerable witness in light of the report. The report provided no real support for the appellant's claim that he was vulnerable as a result of previous torture. Nor did it offer any valuable insight into the appellant's mental health condition, either at the time that it was written or at the date of the appeal hearing, three years or more later. The report gave an indication of what the appellant had said about his mental health but it undertook no assessment of whether he actually suffered from a recognised mental health condition. Dr Sayed did not purport to offer a diagnosis of any such condition. It was presumably for these reasons that counsel who represented the appellant before the FtT (an experienced immigration practitioner) did not invite the judge to treat

the appellant as a vulnerable witness; there was simply no adequate evidential basis for any such application.

29. I do not really understand the second ground of appeal. In fairness to Mr Aziz, he said little about it. The contention appears to be that the judge overlooked the statement made by the appellant's wife and the letter which had been written by the appellant's son. But those documents were described by the judge at [16]-[23] of his decision and were plainly taken into account. It was because the judge found there to be serious difficulties with the account given by the appellant's wife that he came to find that there was no family life between the appellant, his wife and their son. The reasons for that conclusion are cogent. The judge noted that the appellant had produced little evidence in support of contact [25.19]; that he had not varied his bail conditions [25.20]; and that there were inconsistencies between the evidence given by the appellant and his wife: [25.21-[25.27]. The judge was plainly entitled to find, as he did at [25.28] that the appellant had not had any contact with his son since 2013. In reaching that finding, the judge quoted from the letter from the son.
30. Contrary to the assertion in ground three, there is nothing perverse about the judge's findings, whether with reference to the protection claim or Article 8 ECHR. The judge stated at [25.15] that corroboration was not a requirement in asylum claims but he cited *TK (Burundi) v SSHD* [2009] EWCA Civ 40 in the same paragraph and was entitled, pursuant to that decision, to attach weight to the fact that the appellant had failed to produce documents which should have been readily available. There is no proper basis for Mr Aziz's submission that the appellant had been unable to obtain documents as a result of his mental health. The judge considered all of the documents in reaching his conclusions on both limbs of the appeal and reached sustainable findings on the claims as a whole.
31. Mr Aziz also submitted that the judge had failed to take account of evidence that Westernised people are at risk of persecution in Afghanistan. The judge took account of the submission and resolved it with reference to the respondent's Country Information and Policy Unit note: [32]. I have considered the background material which seemingly forms the basis of this submission. In my judgment, it takes matters no further than the CPIN document upon which the judge relied. There was, in the circumstances, no need for him to weigh the one source against the other.
32. The final point, which is said to be part of ground three but really raises a freestanding ground, is that the judge failed to undertake an assessment of the appellant's son's best interests in compliance with s55 of the Borders, Citizenship and Immigration Act 2009. There is obviously nothing in this point; in light of the judge's primary finding about the absence of a relationship between the appellant and his son, s55 should not have come

into his analysis of the Article 8 ECHR claim. He did not err in his consideration of that claim, therefore.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The appeal is accordingly 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 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. It is appropriate to continue this direction, which was first made by the FtT, on account of the fact that the appellant's claim is for international protection.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 June 2021