



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004284
First-tier Tribunal Nos:
PA/55196/2021
IA/15694/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BEN KEITH

Between

Xhavit Dautaj
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Eaton of Counsel, Fatiga & Co Solicitors
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

Heard at Field House on 28 February 2024

DECISION AND REASONS

1. This is an appeal against the decision of the First-tier Tribunal Judge Kudhail ("the Judge"), heard on 17 July 2023 and promulgated on 22 August 2023. The Appellant is a national of Albania, born 25 May 1976.
2. The Appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) against the decision of the Secretary of State dated 18 October 2021 to refuse his asylum and human rights claim.
3. A deportation order was made dated 3 August 2009 pursuant to Section 32(5) of the UK Borders Act 2007. The immigration history and criminal history is outlined in detail by the Judge at paragraph 2 and I do not repeat it here.
4. The Judge ruled against the Appellant finding that both Article 3 and Article 8 were not made out and also against humanitarian protection. There are four grounds of appeal against the decision of the judge and are pleaded in summary as follows:

Ground 1: the failure to make a decision on whether the Appellant and his wife should be treated as a “vulnerable witness”, failure to consider the requirements of the Joint Presidential Guidance.

Ground 2: Failure to consider material evidence-in-chief respect of A’s mental health. Failure to consider material evidence in respect of A’s past history of suicide. Failure to consider evidence of the A’s previous experience of medial treatment of his HIV positive diagnosis. Failure to consider relevant evidence in reaching a conclusion that A does not meet the threshold for the engagement of **AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17**. In light of the evidence before the appeal the FtTJ reached a perverse conclusion threshold and **AM (Zimbabwe)** was not met.

Ground 3: Failure to consider relevant evidence. Failure to resolve disputes over the evidence. Reaching a perverse conclusion in respect of the availability of medical treatment in Albania.

Ground 4: Failure to consider the medical evidence in respect of the appellant’s wife’s health. Failure to consider the conclusions therein in respect of her capacity to care for her son in the appellant’s absence.

5. Mr Eaton submits in relation to Ground 1 that he made an application before the First-tier Tribunal for both the Appellant and his wife to be treated as vulnerable witnesses and that according to the Joint President Guidance Note No.2 of 2010 by Blake J, on Child, vulnerable adult and sensitive appellant guidance, the Judge was required by paragraph 15 to record that decision. Paragraph 15 of the Joint Presidential Guidance says the following:

“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 thus 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”.

6. Mr Eaton submits that he made that application and the judge was required to give a formal ruling in accordance with paragraph 15.
7. Mr Eaton has only been able to refer to his own experience of practice and not to any case law which shows that an explicit reference is required to the Presidential Guidance when making a decision about vulnerable witnesses.
8. There are a number of overlapping issues here. Firstly, whether is a requirement for a specific decision on that topic and whether that requires reference to the Presidential Guidance. Secondly, if that is not followed, whether it has any material impact on the evidence that is given.
9. In my judgment there is no requirement for an explicit reference to the Presidential Guidance to be made however, all Tribunal Judges and fact-finding Tribunals must of course have reference to the bench book and to the assessment of evidence of potentially vulnerable witnesses, that includes taking into account issues of mental and physical health and other potentially vulnerable characteristics. In my judgment the judge had before her significant evidence in relation to mental health. That was mentioned extensively and in my judgment that was sufficient for the judge to take into account on any balancing exercise or any determination of the facts of this case. I did not therefore find that ground 1 is made out and there was an error of law in relation to ground 1.

However, for the reasons that follow, that does mean that the assessment of credibility was accurate or correct.

10. In relation to Ground 2, which is pleaded complexly, there are two factors. Firstly, that the judge did not take properly into account the medical evidence before her and secondly that the judge did not take into account the medical evidence of the appellant's HIV diagnosis and treatment in Albania when making a determination in relation to that issue. In particular, the judge had before her an expert forensic psychiatric report produced by Dr Khan Hamid dated 20 September 2022. The judge examined the expert evidence, which diagnosed the appellant with both generalised anxiety disorder and severe depression. At paragraph 39 the judge deals with that report:

"39. There is an updated medical report from Dr Azmathulla Khan Hameed [AKH] dated 07 September 2022. AKH is a consultant psychiatrist and specialises in autism and intellectual disabilities. At section 3 he sets out his sources, namely the medical report of DJB and the appellants witness statement. He also confirmed he interviewed the appellant prior to writing the report. He sets out his duty to this court. At paragraph 3.5 he accepts the report is based on information provided to him. I note no medical records were provided the AKH. At 6.1 I note he states the appellant has no previous formal diagnosis of mental health. That is incorrect given DJB report. At 7.10 he refers to the impact of the loss of therapeutic and social networks. Yet there is little evidence of any therapeutic and social network support the appellant is currently receiving, other than some phone calls. It is unclear to me how the doctor can make this assessment without having evidence of the nature and frequency of such therapy. He refers to an increase the risk of suicide if the appellant is returned yet there is no evidence before him that the appellant has ever attempted suicide as recorded by AKH, although I accept the appellant claims he has had suicidal thoughts. At 7.18 AKH again refers to an absence of a diagnosis in the context the it does not mean that the condition does not exist. However in the appellant had a diagnosis from DJB. AKH does not consider feigning or exaggeration in his report. I find this damaging. I accept the appellant has generalised anxiety disorder but again exercise some caution."

11. The judge also deals with medical evidence at paragraphs 40 and 41 but nowhere does the judge deal with the issue of the diagnosis of severe depression. That, in my judgment, is an error of law.
12. There are circumstances in which the judge could reject a diagnosis by a qualified expert but if the judge was going to do so then the judge was required to give proper reasoning to that and has not done so. To simply ignore a relevant diagnosis, is in my judgment an error of law.
13. It is important because the threshold in **AM (Zimbabwe)** was said not to have been reached in this case and the issue of severe depression is one that, from the case law and experience feeds into the issue of risk of suicide. In the circumstances the failure to make findings in relation to the diagnosis of severe depression or to take into account in any respect is a material error of law.
14. In relation to Ground 3, Mr Eaton accepts that Ground 3 is parasitic on Ground 2 and essentially argues that the judge failed to take into account various medical factors and failed to resolve disputes in relation to the available medical treatment in Albania. I cannot resolve that issue properly today because, as I

have said, the judge has failed to take into account substantial findings in relation to medical evidence. As a result, Ground 3 is made out because the judge did fail to take into account the mental health evidence. In addition, in relation to the HIV, Mr Eaton submits that the judge failed to take into account the appellant's own experience of his treatment in Albania in relation to HIV and how that shows that there is inadequate provision for HIV treatment in Albania. The judge does not seem to have taken that into account and that will need to be decided by a future Tribunal. I therefore find there is a material error in relation to ground 3.

15. Ground 4 is a mirror image of Ground 3 but in relation to the Appellant's wife. The Appellant's wife also has a mental health diagnosis by the same doctor and again has a diagnosis of severe depression. The judge deals with that at paragraph 59:

"59. ... Whilst ED has a mental health diagnosis of generalised anxiety disorder as stated above, this is managed and she is able to function performing everyday tasks such as working and look after her minor son, without any evidence of difficulties. The evidence on any difficulties she would face relate solely to matters of inconvenience and choice. Taking all these factors into account, which I accept may be uncomfortable, inconvenient, undesirable or merely difficult, these are not issues which make it unduly harsh for ED to go to live in Albania as a family unit."

16. As with Ground 2, the judge has failed to take into account properly the full diagnosis made by Dr Hameed or make a finding that that diagnosis is not properly made out. In the circumstances there is therefore also a material error of law under Ground 4.

Disposal

17. In relation to disposal, the Secretary of State submits that the recent guidance and the Court of Appeal says that matters should stay before the Upper Tribunal and submits that that is the course I should follow. Mr Eaton submits that this case, if it requires full analysis of all the facts and findings in relation to medical evidence and should therefore go back before the First-tier Tribunal.
18. I have taken into account the Presidential Guidance on the rehearing of appeals and in my judgment, this case requires a full rehearing with an analysis of all of the available medical evidence at the point of time that any Tribunal hears the case. That is a task for the First-tier Tribunal in my judgement and not for the Upper Tribunal because all of the facts will require ruling on and I preserve no findings made by the First-tier Tribunal.
19. Therefore in relation to directions, I find material errors of law in relation to grounds 2, 3 and 4. I find no material error in relation to ground 1 and 2. The case should be reheard before the First-tier Tribunal.

Directions

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| 1. | There is a no material error of law in |
| Ground 1. | |
| 2. | There are material errors of law in |
| Grounds 2, 3 and 4. | |
| 3. | The case will be remitted to the First Tier |
| Tribunal for rehearing. | |

Ben Keith

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First-tier Tribunal Nos: PA/55196/2021
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Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 February 2024