



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

Appeal Number: AA/08447/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Reasons and Decision  
Promulgated**

**On 3 December 2015**

**On 14 January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHANA**

**Between**

**MR AHMED MEIRZA  
(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms K Hacker, Solicitor

For the Respondent: Mr S Kandola, Senior Presenting Officer.

**DECISION AND REASONS**

1. The appellant is a citizen of Afghanistan who appeals with permission against the determination of First-tier Tribunal Judge Feeney promulgated on 3 March 2015 in which he dismissed the appellant's appeal against the decision of the Secretary of State made on to remove him from the United Kingdom and refuse to grant him humanitarian protection under article 3 of the European Convention on Human Rights.
2. Upper Tribunal Judge Finch granted the appellant permission to appeal stating that it is arguable that the Judge who had a large amount of expert

medical evidence before her which had not been available at the appellant's previous appeal, failed to give sufficient weight to the fact that the medical report had not merely been commissioned for the purposes of an appeal hearing but was evidence of a chronic and serious mental health disorder but instead made presumptions about the appellant's abilities.

### **First-tier Tribunal findings**

3. The appeal came before First-tier Tribunal Judge Feeney sitting. The Judge made the following findings.
  - (i) For the hearing the appellant's representatives provided a bundle of 430 pages [26];
  - (ii) the appellant did not give evidence at the hearing. He relied upon the letter from Doctor Idit dated 16 January 2015. This letter explained that because of the appellant's current mental state, he would not be able to tolerate giving evidence in the Court and that cross examination could place too much stress on him. There were no other witnesses. [30];
  - (iii) I have taken my starting point the previous history, the various appeals and determination in terms of **Devaseelan [2002] UK IAT 00702**. The new evidence since that date is limited to medical evidence which states that the appellant had been suffering from PTSD. I have been directed to particular passages in the medical report of Doctor Malkin [AB 305, AB 331, AB 213 and AB 305]. I take into account the observations made by Doctor Malkin that inconsistencies in the appellant's account are attributable to his illness. [84]
  - (iv) I accept that he is being treated for PTSD since his arrival in the UK and is now been prescribed medication [86];
  - (v) it is asserted that the PTSD effects his ability to recall information and may account for the inconsistencies in his narrative. I do not accept it credible that his inconsistent accounts are due to his mental health disorder [87];
  - (vi) in reaching this decision I take into account that he is in fact been able to remember and share information with the healthcare professionals involved in his care. Consequently, he should have been able to provide the same information to those responsible for handling an asylum claim to help his case. Instead the information he provided did not suggest exposure to any trauma to the point of his departure [88];
  - (vii) in making this particular finding I have taken into account the different relationships that as a patient he might have with his own doctors as opposed to the relationship he might have with figures of authority and that he might have been less forthcoming with the latter. Nonetheless, I find that he would have been able to engage with the authorities because he has shown that he is able to do so

in respect of other matters such as his ability to approach the Afghan Embassy for a passport and his ability to engage with United Kingdom officials with a view to ensuring he secured appropriate social entitlement benefits and suitable medical care. I consequently find that his ability to approach and engage with others is not as limited as he would like me to believe. [89];

- (viii) I also take into account that he has in fact been able to provide historic information about his personal history and circumstances around his arrival to the UK. But in contrast has been unable to provide details of other matters pertinent to explain when pressed, for example the incidence of trauma he described to his doctors. I have taken into account Doctor Malkin's observation that this can be the result of PTSD but I do not accept as credible that he would have made no mention of the trauma at all despite having been given many opportunities in which to do so [19]:
- (ix) I consider the first test in **J v SSHD [2005] EWCA Civ 629 [2005] IMM AR 409** where the Court of Appeal established six stage test in cases concerning a breach of Article 3. I find that the appellant's illness has not attained a minimum level of severity and required. I do not accept as credible that the appellant has suffered ill-treatment in Afghanistan or that he has been a witness to the ill-treatment of others. I rely on the previous Immigration Judges findings. [93, 94]:
- (x) I also considered the two suicides attempts. In relation to the first attempt that took place on 6 February 2012, I note that the appellant had not been taking his medication at the relevant time. I also note that notwithstanding the appellant's description of "flashbacks to previous traumatic experiences" the notes from the doctor's report faxed on 6 February 2012 states "... He denied suicidal ideation" and "was not deluded", he was fully orientated". [95]:
- (xi) in relation to the overdose which took place on 20 February 2012. I take into account that the appellant was released soon thereafter. I find that his release is inconsistent with someone who is suspected of having a severe condition and of wanting to take his own life. I also note that he has been allowed to collect and be responsible for taking his on medication and I find this is inconsistent with someone who is considered to be at risk of taking an overdose of prescribed medication. [96]:
- (xii) a note from 31 July 2012 (after the two attempted suicide attempts) states that "he believes if he harms himself and sees blood, he will feel better within. Otherwise no major delusions observed".
- (xiii) Other incidents of self-harm were described. I also note the incidents of self-harm were self-reported whilst he was being detained. Significantly they occurred in 2011 and I am told that his condition has since improved. [98]:

- (xiv) Doctor Malkin reports that the appellant's condition appears to be stable and he has shown signs of improvement. He has had no recent admissions to psychiatric hospitals and it has been suggested that he attends on a voluntary basis. He is presently being treated by a GP and is seeking guidance from his Imam. [99]:
- (xv) I note the doctors suggest that coping strategies are diminished in times of stress and that a return will present such a stressful situation as he will be returned to a place where he experienced trauma. I have taken this into account but I do not accept as credible that he did experienced trauma of ill-treatment as suggested. I note the adverse credibility findings made in the previous appeal. It follows that I find he will not be returned to a place of previous trauma and so is coping strategies will not be diminished in the way that has been suggested. [101]:
- (xvi) I consider the second test in **J**. I find that the minimum level of severity has not been attained in this case. I have however considered any connection between the incidence of self-harm and removal. I find there is a connection between the self-harm and the hearings. This is referred to by the respondent in her refusal letter and referred to by the appellant's own doctors. I agree with his observations and find there is a link between the episodes of increased anxiety and upcoming hearings but I do not accept there is a direct connection between the incidence of self-harm and with removal itself. [103, 104]:
- (xvii) I consider the third test in **J** and do not find the appellant satisfies this test. I note that the findings made during the previous appeal. When assessing the appellant's case, the Immigration Judge concluded that the appellant was not a real risk of persecution or other serious harm were he to return to Afghanistan. I have considered whether the new evidence regarding his mental health changes this position and I find it does not for the reasons set out above. [106]:
- (xviii) the Judge considered the fourth and the fifth test in **J** and stated that the appellant does not meet the requirements in those two tests either.
- (xix) I also take into account the decision in **N v SSHD [2008] EWCA Civ 1369** and **Bensaid**. I find for the reasons stated above that the appellant has not demonstrated a likelihood of treatment of such severity as to outweigh the findings in **N**.
- (xx) I am asked to consider the implications of **KH (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1354** where it was stated "the truth is that the presence of mental illness amongst failed asylum seekers cannot really be regarded as exceptional. Sadly, even asylum seekers with mental illness who have no families can hardly be regarded as "very exceptional". If this case is to be regarded as a very exceptional one, there will inevitably be cases, which will be indistinguishable.

A person with no family would have to be equated with a person who has a family but whose members are unwilling or unable to look after him or her. I cannot think that Baroness Hale had such a wide category in mind. In order for a case to be “very exceptional” it would have to be exceptional inside the class of persons with mental illnesses without family support. Perhaps a very old or very young person would qualify were hardly an orderly adult”.

### **The grounds of appeal**

4. The grounds of appeal state the following which I summarise. The challenge to the determination is threefold: the Judge failed to consider for the medical evidence rendering her reasons provided for rejecting said evidence as unsustainable; this in turn led to the subsequent assessment under **J** as flawed. This appeal was the second appeal before the First-tier Tribunal. The appellant’s first appeal in February 2011 was rejected on the bases that his account of the treatment was not accepted and negative findings were made in respect of the appellant’s credibility on the basis that there were inconsistencies and contradictions that had not been addressed, and he could not explain. The cumulative effect was that the appellant was found to be incredible. Since the appeal and those findings, significant further evidence was obtained, namely a detailed witness statement of the appellant and an independent medical report.
5. In the case of **Mibanga with his SS HD [2005] EW CA CAV 367**, the Court of Appeal emphasised the importance of considering medical evidence relevant to credibility as part of the process of reaching a conclusion as to credibility. The Tribunal rejected the appellant’s account and further rejected the medical evidence, significantly the expert report of chartered clinical psychologist Dr Anne Milkin. It is axiomatic that should the first-tier Tribunal assess the new evidence and thus make adverse credibility findings that those findings should underpin any assessment under **J**.
6. The medical evidence before the Tribunal consisted of some 130 pages including medical records and significantly the expert psychologist report of Ann Milkin. It is submitted that the expert report met the test for medical evidence set out in **JL (medical reports - credibility) China [2013] UKUT 00145 IAC**. Accordingly, particular weight should be given to medical evidence that satisfies this threshold. Owing to the significant authority on the use of medical reports, the appellant meets the threshold in the headnotes of the case.
7. The Judge has not addressed the evidence of the appellant in his witness statement nor the independent expert report of Doctor Ann Milkin. The Judge did not make reference to the appellant’s witness statement in the determination and why he stated at paragraph 84 that the new evidence since the last appeal was limited to medical evidence. He failed to mention the detailed witness statement of the appellant which constituted new evidence.

8. At paragraph 86 of the determination, the Judge accepts that the appellant is being treated for PTSD and yet has failed to address why she accepts that the appellant is receiving treatment for PTSD but not the cause for such a diagnosis. The Judges failed to give adequate reasons for her findings on this point despite accepting the relevant facts that the appellant has been treated for PTSD and depression over a sustained period of time, there are two earlier diagnosis of PTSD and that the appellant will not have continued to be treated of a period of four years at a Centre which is a leading clinic for the treatment of inter-alia PTSD if the basis for such a diagnosis was a falsehood.
9. The Upper Tribunal has emphasised that while the Judge is entitled to reject the clinical diagnosis supported by expert evidence, she “must give clear reasons for doing so which engage adequately with a medical opinion representing the Judgement of a professional psychiatrist on what he has seen of the appellant”. The case of **NBN (psychiatric evidence discrepancies) Albania [2010] UKUT 279 IAC** refers. The Judge has not given clear cogent reasons when rejecting the medical evidence as was required of her. The Judge provided inadequate reasons for rejecting the material evidence.
10. The First-tier Tribunal accepted that following **Bensaid v United Kingdom [2001] AC** Article 8 and Article 3 could be engaged in a case involving mental illness, but as in that case, the appellant has not shown any exceptional circumstances. The Tribunal found that the medical treatment was available in Zimbabwe and the appellant could return to be with his family.
11. The Judge has provided inadequate reasons for rejecting this material evidence and in failing to provide clear and cogent reasons for departing from the medical evidence, thus supporting the contention that the evidence was not addressed with the appropriate care as is required.

### **Respondent’s Rule 24 response**

12. By way of a reply to the grant pursuant to Rule 24, the respondent stated the following which I summarise. The Judge of the First-tier Tribunal directed himself appropriately. The grounds argue that the Judge failed to take into account the further medical evidence and failed to give adequate reasons for discounting that evidence. At paragraph 84, the Judge takes as his starting point the previous determination relating to the appellant and then expressly turns to look at the medical evidence that postdates it. It is clear from the determination that the Judge made findings in relation to the new medical evidence and relied on by appellant from paragraphs 88 and 91. The Judge gave numerous reasons for rejecting the expert evidence and the suggestion that the Judge failed to give sufficient weight to the Report is merely a disagreement with the outcome. There is nothing disclosed in the reasoning in paragraph 88 and 91 that suggests that the Judge did not follow the guidance outlined in the case of **Mabanga**.

**Decision as to whether determination of the First-tier Tribunal involved the making of an error of law?**

13. I have given careful consideration to the determination of the First-tier Tribunal Judge to ascertain if there are any material errors of law. The Judge in a detailed and well-reasoned determination dismissed the appellant's appeal. The Judge cited the relevant jurisprudence and was properly guided by it. The appellant's complaint about the determination has no valid legal bases but is a mere disagreement with the Judge's findings of facts and the conclusions that he came to on those facts.
14. In his determination, the Judge accurately states that in line with the case of **Devassleen**, the previous determination of the First-tier Tribunal must be his starting point in the appeal. The previous Judge did not find the appellant credible and did not find credible his claim that he was persecuted or had witnessed any traumatic event in Afghanistan. That is the position from which the Judge considered the evidence which was not before the previous First-tier Tribunal in this appeal. The Judge correctly identified that the evidence which was not before the previous Judge, was the medical evidence. There is no complaint against the Judge that he did not consider the medical evidence provided by the appellant. The complaint is that the Judge did not agree with the appellant's view on how the medical evidence should have been considered and the conclusions reached.
15. A complaint is made that the Judge did not refer to the appellant's witness statement, in the determination. This is not borne out because at paragraph 26 of the determination, the Judge recorded that the appellant has provided a bundle documents of 430 pages and "included within the bundle was the appellant's witness statement". Therefore, the Judge considered all the evidence in the round. It is not incumbent on the Judge to set out each piece of evidence in his determination.
16. The Judge took into account the appellant's claim that the inconsistencies in the appellant's evidence at the previous Tribunal were due to his PTSD and said, Doctor Malkin's observation reveals that. The Judge give cogent reasons for why he did not accept that the appellant's diagnosis of PTSD would have led to the inconsistencies in the evidence at the previous hearing.
17. In reaching his decision, the Judge stated that the PTSD cannot explain the inconsistencies in the evidence and took into account at paragraph 88 that the appellant is in fact able to remember and share information with the healthcare professionals involved in his care. Consequently, he should have been able to provide the same information to those responsible for handling an asylum claim to help his case. Instead the information he provided did not suggest exposure to any trauma up to the point of his departure. This is a perfectly sustainable reason because if the appellant was able to share information with his medical care professionals, there was no reason why he could not share it with the immigration officials.

18. The Judge also took into account at paragraph 98 that the appellant may have a different relationship with his own doctors as opposed to the relationship he might have with figures in authority and that he might have been less forthcoming with the latter. Nonetheless the Judge found that he would have been able to engage with the authorities because he has shown that he is able to do so in respect of other matters such as his ability to approach the Afghan Embassy for a passport and his ability to engage with United Kingdom officials with a view to ensuring he secured appropriate social entitlement benefits and suitable medical care. The judge was entitled to find that his ability to approach and engage with others is not as limited as he would like the Judge to believe.
19. The other reason given by the Judge for why the appellant's PTSD cannot explain the inconsistencies in his evidence before the previous Judge, was at paragraph 19. He stated that the appellant has in fact been able to provide historic information about his personal history and circumstances around his arrival to the UK. But in contrast has been unable to provide details of other matters pertinent to explain when pressed, for example the incidence of trauma he described to his doctors. The Judge was entitled to find that there was no evidence that PTSD leads to selective memory which depends on who the appellant talks to. The Judge said also did not find credible that the appellant would have made no mention of the trauma he suffered, despite having been given many opportunities in which to do so. The Judge therefore did not accept the new evidence provided by the appellant that his PTSD explained the inconsistencies in his evidence before the previous Judge. These are sustainable findings and there is no perversity in them.
20. Having made this finding, the Judge was then entitled to rely on the findings of the previous Judge in his determination who found that the appellant had not witnessed any incident of trauma in Afghanistan for him to be traumatised. The Judge correctly found that the previous Judges adverse credibility findings are his starting point. There was no credible evidence which persuaded the Judge otherwise.
21. The Judge had regard to the Strasbourg jurisprudence in respect of mental health relevant to Article 3 and Article 8 in respect of physical and moral integrity. He referred to the leading case of **N v Secretary of State for the home Department [2005] UK HL 31** where it was held by the House of Lords that there must be shown that the appellant's medical condition has reached such a critical state that there are compelling and humanitarian grounds for not removing him or her to a place which lacks the medical and social services which he or she would need in order to prevent acute suffering. The House of Lords approach was confirmed by the European Court of Human Rights. The Judge was therefore aware of the standard against which the appellant's appeal has to be assessed and recognised that the threshold to succeed under Article 3 on medical grounds is very high.



22. The Judge took into account the case of **Bensaid** where the applicant suffered from long-term schizophrenia and it was argued on his behalf that his condition would seriously deteriorate if he returned to his home country because of difficulties in obtaining suitable medication. It was found that while in principle this could engage Article 3 the Court found that there were no exceptional circumstances that the claimant should succeed.
23. Similarly, the Judge found that in this case there are no exceptional circumstances and the appellant's appeal fails to establish his case under Article 3 and Article 8 of the ECHR in respect of his mental health problems.
24. The Judge in making this decision gave proper consideration to the expert medical report of Doctor Malkin and the appellant's witness statement. Doctor Malkin's reports state that the appellant's condition appears to be stable and has shown signs of improvement. He has had no recent admissions to psychiatric hospitals and it has been suggested to him that he attends on a voluntary basis. He is presently being treated by a GP and is seeking guidance from his Imam.
25. The Judge also took into account the decision in **AE and FE [2002] UK IAT 05237** where it was stated that all those involved in the appellant's medical care in preparation of medical reports, accepted the appellant's account put to them as truthful and found the events he described as having occurred to be causative of psychiatric illness. The history taken by his doctor's records for the appellant has told them. They have accepted his account but by him as truthful. The Judge stated that it is for him to decide issues regarding the appellant's credibility with regard to causative incidents and the Judge found that he does not accept that the appellant has any psychiatric or physical condition as a result of his claim problems or of any trauma in Afghanistan. The Judge was entitled to find that the medical fraternity was not in a position to find the appellant credible or otherwise. The previous Judge who heard the appellant's appeal and heard all the evidence found the appellant not to be credible.
26. The Judge also took into account that even after the appellant's two suicide attempts, not only was he released after the second attempt, he was given medication to self-medicate which demonstrated that the authorities did not have any concerns about the appellant's future suicidal tendencies. These are sustainable finding that the appellant is not a suicide risk presently and that even if he is that his condition could not be managed in transit. The Judge correctly found that the appellant can return on the non-detained route if he chooses. The Judge correctly found that the appellant is being removed to a place where he has not demonstrated that he experienced a specific trauma.
27. The appellant submitted that the expert report met the test for medical evidence set out in **JL (medical reports - credibility) China [2013] UKUT 00145 IAC** and stated that the appellant meets the tests in **J**. The

Judge however resoundingly found otherwise. He considered each test in J and for good reasons found that the appellant was not captured by any one of them.

28. The Judge was aware as the low quality of the treatment available to Afghan nationals with mental disabilities and found that medical facilities in Afghanistan are not at par with the medical facilities in this country but noted that that is not reason enough for the appellant to be granted humanitarian protection in the United Kingdom. The Judge considered that notwithstanding the submission by the appellant that there are only two psychiatrists in Afghanistan, the appellant in this country has sought the assistance from a variety of medical professionals including the GP who treats his condition at present. He said that the appellant will be able to seek equivalent care in Afghanistan. He further said that the appellant is able to rely on the techniques of coping mechanisms acquired in the United Kingdom to deal with stressful situations. He accepted that the appellant will have to pay for his medication but of the medication is available nonetheless. The appellant is also seeking guidance from his local Imam which he will also be able to do in Afghanistan. The judge found that the appellant does not have an objective or subjective foundation to his fear that his condition will deteriorate on his return to Afghanistan.
29. Accordingly, I am satisfied that the judge did not make a material error of law in refusing the appellant's appeal was under Article 3 and Article 8. I find that a different Upper Tribunal Judge would not reach any other conclusion taking into account all the evidence and the law in this appeal.

Decision

**Appeal Dismissed**

Signed by  
Mrs S Chana  
Deputy Judge of the Upper Tribunal

Date 17<sup>th</sup> day of December 2015