Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08989/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd January 2019	**On 15th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

SA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms. B. Asanovic, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The First-tier Tribunal ("F*t*T) has made an anonymity order and for the avoidance of any doubt, that order continues. SA is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the

appellant and to the respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

2. This is an appeal against the decision of First-tier Tribunal ("F*t*T") Judge Devittie promulgated on 21st June 2018. The F*t*T Judge dismissed the appellant's appeal against the respondent's decision of 31st August 2017 refusing her claim for asylum.

3. The appellant is an Afghan national. The appellant claims that her husband and daughter had been killed by a Governor, who was a Jihadist. Her husband had previously been employed by the Ministry of Defence and in the course of his duties he had mistreated a Jihadist, who is now an official in one of the areas of Kabul. She claims to have left Kabul on 24th October 2012, shortly after the murder of her husband and daughter. She travelled to Dubai where she stayed for a period of 28 days. From there, she travelled to Austria where she made a claim for asylum. She then travelled to the UK using a false passport and claimed asylum on 10th December 2012. Her asylum claim was refused in August 2014 and her appeal against that decision was dismissed by F*t*T Judge Morris for the reasons set out in a decision promulgated on 27th April 2016. An appeal to the Upper Tribunal was dismissed for the reasons set out in a decision promulgated on 29th June 2016 and the appellant was appeal rights exhausted on 1st November 2016. In or about February 2017, the appellant made further submissions to the respondent and it was the decision of the respondent dated 31st August 2017, that gave rise to the appeal before the F*t*T Judge.

4. In readiness for the hearing of the appeal before the F*t*T Judge, the appellant's representatives had filed and served a bundle comprising of some 58 documents over 392 pages. Although much of that bundle included background material, the first 62 pages included in a psychiatric report, and statements from the appellant's father, brother and sister. The day before the hearing of the appeal, the appellant's representatives

also served a statement made by her daughter ("LA") and a statement made by her son ("HA").

The decision of the F*t*T Judge

5. At paragraph [3] of his decision, the F*t*T Judge sets out a summary of the appellant's claim for asylum. At paragraphs [4] to [6] of the decision, the Judge refers to the findings made previously by F*t*T Judge Morris in April 2016 and the observations made by the Upper Tribunal in June 2016. At paragraphs [7] to [9], the Judge refers to the psychiatric evidence before him, noting that the appellant suffers from post dramatic stress disorder and the opinion of the psychiatrist that the appellant did not have capacity to give evidence. At paragraphs [10] to [14], the Judge refers to the submissions made on behalf of the appellant. The Judge's findings and conclusions upon the protection claim are set out at paragraphs [17] to [19] of the decision, and the Judge's conclusions upon the Article 8 claim based upon a 'suicide risk' are to be found at paragraphs [20] to [23] of the decision. At paragraphs [16] to [18] of the decision, the Judge states:

> "16. The questions that this appeal raises were determined by this tribunal in a previous determination. The first immigration judge on that occasion made clear findings of fact to the effect that the appellant had not established that her husband had been killed as well as her daughter by the governor. The first immigration judge also made clear findings that she would not be at risk as a lone woman returning to Afghanistan in part because she would be returning with her son.
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> 17. It is contended on appellant's behalf that this tribunal should reconsider the findings of the first immigration judge and come to a different conclusion in the light of the medical evidence that has now been presented. I have examined with anxious scrutiny the medical evidence presented. It sets out the scientific principles in support of the fact that mental ill-health of the sort suffered by the appellant can affect memory. The psychiatrist also was of the opinion that her mental condition was such that that she was not capable of giving evidence in this hearing.
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> 18. In my opinion however, no case has been made out, to justify the conclusion that this tribunal should come to a different conclusion to that of the first immigration judge. I have arrived at this decision for the following reasons:

> (1) The first immigration judge made clear and comprehensive findings of credibility when he dismissed this appellant's claim. It is contended on the appellant's behalf that if the immigration judge had before him the psychiatrist's report indicating the appellant's loss of memory this could have affected her presentation of the asylum claim, he would have come to a different conclusion. It does not seem to me, from a reading of the credibility findings, that they rest wholly on the appellant's failure to recall certain details of the past. I should add, quite apart from making the submission that her memory affected her presentation of her asylum appeal, the appellant's counsel has not drawn my attention to particular findings the first immigration judge made in his credibility findings that can be attributed to this this appellants lack of memory. Appellant's counsel has not drawn attention to any responses in the asylum interview that show failure of memory.
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> (2) The Upper Tier Tribunal found no error in the First-tier Tribunal's findings of fact. This is therefore, in a sense, an attempt for a reconsideration of those findings of fact, on the basis that at the time of the hearing her memory was so compromised, that the credibility findings of the first immigration judge should not stand. Looking at the appellant's claim, in its overall context, this would seem to have been a high-profile murder by a very senior public official. In seeking this reconsideration reliance is placed solely on the psychiatrist's report, but no effort has been made to give credence to the incident upon *[she]* failed memory is based in the form of any publication in the media of this event."

The appeal before me

6. The appellant advances a number of grounds of appeal. Permission to appeal was granted by Upper Tribunal Judge Dr H Storey on 21st November 2018. The matter comes before me to consider whether or not the decision of F*t*T Judge Devittie involved the making of a material error of law, and if the decision is set aside, to re-make the decision.

7. At the conclusion of the hearing before me, I informed the parties that in my judgement, the decision of the F*t*T Judge is infected by a material error of law and that the decision should be set aside. I said that I would give the full reasons for my decision in writing. This I now do.

Error of Law

8. As is apparent from the extracts of the decision of the F*t*T Judge that I have set out above, F*t*T Judge Devittie was not satisfied that this was an appeal in which he should depart from the adverse credibility findings made by F*t*T Judge Morris previously, in the decision promulgated on 27th April 2016. The first two grounds of appeal advanced by the appellant and that were the focus of the submissions before me by Ms Asanovic, centre upon the F*t*T Judge's conclusion that the appellant has not made out her case to justify the conclusion that he should come to a different conclusion to that of the "first immigration judge".

9. It is said by the appellant that in reaching his decision, F*t*T Judge Devittie failed to consider the evidence of the appellant's son and daughter, who had both made statements, and who had both been tendered for cross examination at the hearing of the appeal. Their evidence was at least capable of corroborating the appellant's account of events, and there had been no previous adverse credibility findings made against the appellant's daughter. Ms Asanovic submits that surprisingly, there is no reference at all in the decision of F*t*T Judge Devittie, to the evidence that was before him and the Judge focuses in his decision, entirely upon the previous decision of F*t*T Judge Morris. Ms Asanovic submits that although the Judge makes reference to the psychiatric report before him, and notes in particular, that the appellant was prescribed medication in 2014, and thus pre-dating the hearing of her appeal in 2016, the Judge appears to dismiss that evidence by concluding in paragraph [17] of the decision, that the psychiatric evidence set out the scientific principles in support of the fact that mental ill-health of the sort suffered by the appellant can affect memory. The Judge fails to properly address the psychiatric evidence which was in fact that there was significant evidence that at the hearing previously, the appellant would have been suffering from significant symptoms of depression, psychosis and previous trauma.

10. Mr Kotas, rightly it seems to me, accepts that the F*t*T Judge fails to refer to the evidence that was before him, including the statements of the

appellant's son and daughter, and any oral evidence that they may have given.

11. As there has been a previous determination by an F*t*T Judge, the **Devaseelam** principles plainly apply. Ms. Asanovic accepts, quite properly, that the first Judge's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. Facts happening since the first Judge's determination can always be taken into account by the second Judge. The previous decision, on the material before the first Judge and at that date, is not inconsistent with the second Judge's decision. Facts personal to the appellant that were not brought to the attention of the first Judge, although they were relevant to the issues before him, should be treated by the second Judge with the greatest circumspection. An appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome, is properly regarded with suspicion from the point of view of credibility. It must also be borne in mind that the first Judge's determination was made at a time closer to the events alleged and in terms of both fact-finding, and general credibility assessment, the first Judge would tend to have the advantage.

12. Although the first Judge's determination should always be the starting-point, it is not the end point. What is clear is that the F*t*T Judge here, has failed to refer to the evidence that was before him in reaching his decision. It may well be that having considered that evidence, and in particular, the evidence of the appellant's daughter, the F*t*T Judge would have reached the same decision, but there is simply no reference at all in the decision, to that evidence. The weight to be attached to it, would have been a matter for the Judge but in the absence of any reference to the evidence in the decision at all, I cannot have any confidence that it was considered by the Judge at all.

13. The Psychiatric report of Dr Basu followed an examination on 14th December 2017. There had been no Psychiatric evidence at the hearing of the appeal before F*t*T Judge Morris on 23rd March 2016 and the

appellant had given oral evidence at that hearing. Dr Basu states in his 'Opinion and Recommendations' that the appellant was formally diagnosed as suffering from PTSD, in October 2016. At paragraph [10.2.1] of the report, Dr Basu notes that there is very little information available about the appellant's mental state in July 2014, However, it is known that in June 2014 she was prescribed amongst other medication, medication for psychosis, and medication for depression, anxiety or obsessive compulsive disorder. At paragraph [10.2.2], Dr Basu notes that "*... There is significant evidence, therefore, that at her hearing on [28 June 2016] Ms Amiry would have been suffering from significant symptoms of depression, psychosis and previous trauma".* That is evidence that goes beyond "scientific principles in support of the fact that mental ill-health of the sort suffered by the appellant can affect memory". It was at least some evidence that was capable of undermining the adverse findings made against the appellant previously and required careful consideration.

14. In my judgement, the absence of the reference to the evidence before the F*t*T Judge, taken together with a failure to adequately engage with the psychiatric report establishes a material error of law in the decision of the F*t*T Judge, such that it should be set aside. I have carefully read the decision of the F*t*T Judge. The Judge may have been entitled to treat the fresh evidence with some circumspection, but the Judge appears to have treated himself as bound by the previous decision without making findings of his own, as to the fresh evidence adduced before him, that had not been before the Tribunal at the time of the previous decision. The outcome of the appeal might well have been the same, but I cannot be sure that it would have been. The error of law is one that is therefore capable of affecting the outcome of the appeal.

15. I do not therefore consider it necessary to consider the further grounds of appeal that are relied upon by the appellant. Suffice it to say for present

purposes that the F*t*T Judge also failed in the decision, to address the Article 8 appeal on family or private life grounds.

16. The decision needs to be re-made and, as suggested by the parties, I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012 which states;

> '7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
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> (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.'

17. In my view, the requirements of paragraph 7.2(a) and (b) apply. The Judge has failed to set out, and carefully consider in his decision the evidence before him. The nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

18. The decision of the First-tier Tribunal is set aside.

19. The matter is remitted to the First-tier Tribunal for hearing afresh, with no findings preserved.

20. An anonymity direction is made.

Signed Date 7th January 2019

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

No fee is payable and there can be no fee award.

Signed Date 7th January 2019

Deputy Upper Tribunal Judge Mandalia