



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

Appeal Number: PA/08674/2019

**THE IMMIGRATION ACTS**

**Heard via Skype for Business at Field  
House  
On 25 September 2020**

**Decision & Reasons  
Promulgated  
On 20 October 2020**

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**AS  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms E Fitzsimmons, instructed by Duncan Lewis & Co  
Solicitors (Harrow Office)

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of Afghanistan who appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 19 August 2019 refusing to grant him asylum and humanitarian protection.
2. There is an anonymity direction in this case which is maintained, there having been no application to withdraw it.

3. The appellant had a previous appeal in 2011, having come to the United Kingdom, on his account, in 2008. Following refusal of further submissions in May 2013 he absconded and was then encountered by the police nearly three years later and served with removal directions.
4. The essence of his claim was that his life was in danger because of the Taliban. He stated that his father was a group leader and sometime after he left the Taliban he was killed and the family was dispersed and separated and he had no one left in Afghanistan and no means of contacting them. He believes that his life would be in danger on return.
5. The judge did not accept that the appellant's father was a member of the Taliban nor did he accept that his father had been killed. It was noted that the family had waited in the same house before apparently leaving Afghanistan. Also, he had left it very late to attempt to trace his family, having made such contact just two days before the hearing in 2011. The judge did not accept risk on return to his home village in Laghman Province or to Kabul.
6. The factual basis of the appellant's claim was not different before the judge in the instant appeal. However, the appellant had provided expert evidence in the form of a report from Dr Ahmad who was a lecturer in Global Health at St George's University of London, and also a psychiatric report prepared by Dr Burman-Roy diagnosing PTSD and depression. There was also a country expert report from Dr Giustozzi.
7. In his findings, having noted the appellant's immigration history, the judge referred to the decision in Devaseelan and applied the principles set out there as a starting point for consideration of this appeal. The judge noted that the claim of the appellant specific to Afghanistan had not changed. Whilst reliance was placed upon the deteriorating security situation in the home area and in the country in general the claim was the same. There had been no further threats issued. No new factual information had been presented by the appellant in relation to his claim. The judge noted that reliance was placed upon the fact that there was no medical evidence before the Tribunal in 2011 and specifically the diagnosis of PTSD and depression. The judge remarked that this was accurate but it was also true that it was not advanced on behalf of or from the appellant. It was to be remembered that at the time of his appeal in 2011 he had been in local authority care as a minor, since his arrival in 2008. However, no one on his behalf had considered it realistic to suggest that he was vulnerable on account of PTSD at the time and the judge concluded that that was clearly because it did not exist at the date of the appeal.
8. He considered that the important fact about this case was that the appellant's claim was rejected, and the factual basis of his claim was not accepted. If, therefore, he now suffered from PTSD and depression it was reasonable to conclude that these factors were wholly unrelated to his stated fears and claim in Afghanistan. He also noted that his condition had not prevented him from absconding knowing full well that he had no

basis to be in the UK, and also noting that he was fully able to engage with the appeal in perfect English having been able to instruct an expert.

9. The judge went on to say, with regard to the evidence of Dr Ahmed and Dr Burman-Roy that the problem with both was that they both relied upon the factual account that had been given by the appellant. They regarded it as “a given”. The problem was that this account had been rejected and dismissed by a Judge of the Tribunal, a decision upheld and supported by the Upper Tribunal. The judge considered that if the appellant did have PTSD and depression they were related to other factors totally unconnected with his expressed fear of return to Afghanistan. The Tribunal saw no reason to depart from the findings of the judge in 2011. The claim had been of limited credibility then and remained so now. Nothing had occurred factually to alter or depart from the judge’s findings in 2011.
10. The judge’s decision was challenged by the appellant on three bases. The first was that the judge had erred in his credibility findings in that the psychiatric evidence before him clearly concluded that the appellant’s PTSD and depression were materially caused by his experiences in Afghanistan and pre-dated his 2011 appeal. Dr Burman-Roy had accepted the appellant’s mental health conditions were caused at least in part by his experiences in Afghanistan. The judge had erred in the way described in Mibanga [2005] EWCA Civ 367. It was also said to be irrelevant taking into account the appellant’s mental health to say that it had not prevented him from absconding. Neither this nor his ability to instruct an expert in perfect English were reasons for querying an unchallenged diagnosis of PTSD and depression.
11. It was also argued that the judge’s reasoning for rejecting the Article 15(c) claim was inadequate in that no substantive reasons were given for rejecting the claim in this regard. It was also argued the judge had erred in not referring to the UNHCR’s Eligibility Guidelines from August 2018 with regard to the viability of internal relocation in Kabul. Permission was granted on all grounds.
12. In her submissions Ms Fitzsimmons adopted and developed the points made in the grounds. With regard to ground 1, the mental health diagnosis went to the issue of the appellant being a sensitive witness before the Secretary of State and the judge and it was relevant to the question of credibility how his evidence was assessed. It also supported his account of events in Afghanistan before he fled. Dr Burman-Roy was fully aware of the credibility landscape as could be seen from the report, and reasons were given for the diagnosis and an explanation that was consistent and scored on the ratings. The expert had considered matters such as potential malingering and had also taken into account the Istanbul Protocol. He concluded that the appellant’s condition was as a result of a situation of catastrophic stress and considered the events as they impacted on him in Afghanistan were consistent with the course of events. He had fled Afghanistan as a minor and was separated from his family and

these and other potential causes were considered but not because of PTSD which only events of Afghanistan would cause. This was important as all possible causes had to be considered. It was concluded as a consequence that the appellant was a vulnerable witness. It was therefore an objective assessment by the expert who had not just taken the appellant's word for it but had considered other causes.

13. As regards humanitarian protection this had been addressed in the skeleton argument before the judge. The judge's paragraph 75 was insufficient to deal with the claim. What had been said in the first decision of the Tribunal in AS with regard to the EASO evidence was of materiality.
14. As regards the country evidence and the UNHCR Guidelines, the decision was before the second Tribunal decision in AS but it was still a good submission with regard to the judge's assessment of risk and relocation. It had been accepted in the second AS decision that mental health was very important in Afghan cases and there was a dearth of mental health provision in Afghanistan and the judge's failure to deal with the UNHCR evidence was material and was relevant to the reasonableness of relocation to Kabul.
15. In his submissions Mr Clarke argued there was a significant flaw in the medical evidence in that it did not say that the appellant had mental health problems in 2011 and however there was not enough to underline the findings from 2011. He referred to paragraph 40 of Devaseelan - the requirement that with respect to matters which could have been before the earlier judge which were now put forward should be treated with the greatest circumspection. It would be less so if there was a good reason and that was claimed to be the medical evidence. But a robust case had been put forward in 2011, and the appellant had been represented by experienced counsel.
16. With regard to the scope of the reports, as to whether the appellant's problems were caused by his experiences before 2011 the judge quoted from the medical evidence and clearly referred to the original credibility findings and these were not questioned with regard to the cause of the PTSD. Mr Clarke referred to the medical report at B57 onwards. He relied on the authority he had put in of JL [2013] UKUT 00145 (IAC) and the requirement at paragraph 2 of the headnote that those writing medical reports should bear in mind that when an advocate wished to rely on their medical report to support the credibility of an appellant's account they would be expected to identify what about it that afforded support to what the appellant had said and which was not dependent on what the appellant had said to the doctor. It was also said that the more diagnosis was dependent on assuming that the account given by the appellant was to be believed the less likely it was that significant weight would be attached to it. There had been no medical evidence before the expert. With reference to traumatic experiences, there were clearly significant credibility findings in the 2011 decision and it was relevant to the matters which the appellant said had given rise to his mental health issues.

17. It was surprising that no direct questions had been in terms as to whether the appellant had mental health problems in 2011 and whether there was enough to undermine those findings. The judge noted that as the claim was the same as the same as in 2011 the findings were reasoned. He had considered the matter at paragraph 70 after looking at all the evidence and it was therefore not a Mibanga case. There was no previous suggestion of mental health issues. The findings were open to the judge and there was no evidence to suggest mental health issues in 2011 and the experts had not suggested that he had had such issues. It must be questioned therefore what would warrant departure from the earlier findings and it was sustainable not to depart from them. The appellant had been able to abscond for three years and to instruct the expert in good English. These were relevant considerations. The experts had accepted evidence that had been found to be credible. There was no need to go behind the imputed findings.
18. With regard to ground 2 and the Article 15(c) issues, it was argued that with respect to the home area as in the skeleton argument the judge had addressed this in connection with Kabul and the grounds went nowhere near challenging that. This led into ground 3, which had been drafted before the second decision in AS. In that decision the figures that had been disputed were not considered but also the UNHCR Guidance for 2018 and it was known that AS (2) too did not accept that and found no Article 15(c) risk in Kabul. Grounds 2 and 3 therefore did not go behind the judge's findings.
19. By way of reply Ms Fitzsimmons argued that the expert had been aware of the previous findings but had also said that his conclusions were based on objective clinical observations and other sources. Read as whole, he was not unaware of the previous history and made an evaluation and addressed the various key impacts on the appellant's life and said they did not explain why he had PTSD now. This had to be engaged with by the judge. Nor had the judge sufficiently explained why the medical evidence was not relevant to credibility. But he had not disputed the diagnosis and therefore the appellant would return to Afghanistan with a mental health diagnosis and this was relevant to risk in the home area and to relocation to Kabul. If there were a risk of Article 15(c) ill-treatment in the home area the question was whether the appellant could reasonably relocate to Kabul and that was a different test. There would be a material error of law if the Tribunal found the judge had erred with respect to the home area. With regard to the UNHCR Guidelines it was argued at the time that they were enough to show Article 15(c) risk in Kabul. The guidelines had not been accepted in the second decision of the Tribunal in AS but were relevant to Kabul including mental health issues on relocation. The grounds at paragraph 18 were broader than just saying that there was an Article 15(c) risk in Kabul and there was a question of relocation. These were material errors.
20. I reserved my decision.

21. I consider that the main issue of challenge in this case is with regard to the judge's findings on the medical evidence, bearing in mind the absence of any evidence of mental health problems of the appellant at the time of the earlier appeal hearing in 2011. The factual claim of the appellant as regards the risk on return from the Taliban remains the same. The appellant was, as set out above, found to lack credibility at the earlier hearing, and the argument before the judge was that the earlier findings should be departed from as the judge had not had the benefit of psychiatric and country evidence and that therefore his findings should not be followed.
22. Dr Burman-Roy who is a consultant psychiatrist, interviewed the appellant on 9 February 2019. He stated at paragraph 1B that the information in the report was based on the history provided directly to him by the appellant together with his own observations and the report did not rely on material from any other source unless specifically stated. He set out the background history and also referred to the sources of information consulted, which included the First-tier Tribunal decision of 30 November 2011. Having set out the appellant's account of his childhood and family history, Dr Burman-Roy noted that the appellant stated that he had never had any treatment for his mental health difficulties. He attended intermittent therapy sessions at the South London Refugee Association between September 2017 and August 2018. He referred to a number of traumatic experiences including the loss of his father and the loss of his family and his inability to find his family through the Red Cross and the ongoing fear of return.
23. Dr Burman-Roy considered his presenting symptoms and history of presenting symptoms first with regard to PTSD and second with regard to depression. He made a diagnosis of severe PTDS and severe depression. He noted that PTSD and depression symptoms often co-exist. He considered whether or not the appellant was feigning or exaggerating his symptoms and concluded that he was not. He recommended that should the appellant be required to give evidence the impact of his PTSD and depression should be taken into consideration and whether he should be treated as a vulnerable witness in accordance with the relevant guidance. He considered that it was common for trauma survivors to experience memory loss which can lead to recall of events varying and memories returning or changing with time. He noted that the appellant reported difficulties with memory and concentration. He had the mental capacity to understand and advise and give clear instructions but might at times require further support and time to allow him to understand proceedings.
24. He had described ongoing symptoms of PTSD as specifically related to experience of torture in Afghanistan which Dr Burman-Roy considered would be consistent with the course of event in PTSD as described as above in the report. Further matters that are of relevance in this regard were the experience of having to flee to the UK as a minor and separation from his family, the stress of his current immigration status and his previous detention.

25. I take the point made by Mr Clarke that this evidence did not specifically address the question of the appellant's mental health in 2011 where there was no evidence. However, I do consider that there is clearly sufficient by way of evidence connected to the mental health problems that the appellant has and the relevance of those to his credibility that the judge erred in law in concluding as he did that the fact that the appellant's account had been rejected and dismissed by a judge of the Tribunal that in effect that the medical evidence could be discounted because Dr Burman-Roy and Dr Ahmad both relied upon the factual account given by the appellant. The conclusion of the judge, that the appellant did have PTSD and depression though related to other factors totally unconnected with his expressed fear of return to Afghanistan, in my view signally failed to take account of the medical evidence and as a consequence the decision requires to be remade.
26. At the same time there will need to be further consideration of internal relocation including the relevant guidance in that regard and also the Article 15(c) issue, which again received scant consideration from the judge. That will require a full rehearing of this appeal before the First-tier Tribunal. To that extent this appeal is allowed.

**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

Dated: 7 October 2020

Upper Tribunal Judge Allen