



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

Appeal Number: AA/00698/2014

**THE IMMIGRATION ACTS**

**Heard at Columbus House,  
Newport  
On 25<sup>th</sup> March 2015**

**Decision and Reasons  
Promulgated  
On 13<sup>th</sup> April 2015**

**Before**

**UPPER TRIBUNAL JUDGE POOLE**

**Between**

**CJ  
(ANONYMITY DIRECTION MAINTAINED)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Andrew Joseph, Counsel

For the Respondent: Mr Irwin Richards, Home Office Presenting Officer

**DETERMINATION & REASONS**

**Decision**

1. This appeal is subject to an anonymity order made by the First-Tier Tribunal. Neither party invited me to rescind the order and I continue it pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

2. The appellant is male national of Afghanistan, who claimed asylum and leave to remain in August 2008. The claim was refused in April 2012, but the appellant appealed that decision before Designated Judge Phillips on 26 June 2012. That appeal was dismissed and leave to appeal to the Upper Tribunal was refused. The appellant's representatives made further submissions in September 2012, which, in the view of the respondent, did not amount to a fresh claim. That decision was challenged upon judicial review and as a result via a consent order further representations were permitted, which the respondent did treat as a fresh claim, but still resulted in a refusal by a decision letter dated 10 January 2014. The appellant appealed that decision.
3. The appellant's appeal then came before Judge of the First-Tier Tribunal Whiting sitting at Newport in June 2014. An oral hearing was held. Both parties were represented (in the appellant's case by Mr Joseph). In a determination dated 23 June 2014, Judge Whiting dismissed the appellant's appeal on all grounds. The appellant sought leave to appeal. The grounds alleged error in a number of areas, but in summary the allegations involve a failure to engage properly with the medical evidence and with comments made by Designated Judge Phillips, and Upper Tribunal Judge Storey (who had dealt with the JR application). In addition allegations criticised the determination with regard to the findings under Articles 3 and 8 ECHR.
4. The application for leave came before Judge of the First-Tier Tribunal Reid, who refused the application for the following reasons:
  - “1. The Appellant seeks permission to appeal, in time, against a decision of the First-Tier Tribunal (Judge Whiting) who, in a determination promulgated on 25 June 2014, dismissed the Appellant's appeal against the Respondent's decision dated 10 January 2014 to refuse to grant asylum and to remove the Appellant from the UK.
  2. The grounds argue inter alia the judge erred in law: by ignoring or inadequately considering the observations made by Upper Tribunal Judge Storey in his oral judgment on 26 March 2013; by not taking as his starting point the findings of DJ Phillips nor did he demonstrate good reason to depart from them; by failing to address adequately the formal diagnosis since the June 2012 determination; by not considering or assessing the totality of the medical evidence; by failing to consider adequately the Articles 3 and 8 arguments.
  3. The judge's findings are based on the evidence presented and are supported by a careful analysis and detailed reasons in a lengthy determination. The judge at paragraphs 35 - 51 records the Appellant's mental health problems and at paragraphs 56 - 65 considers the implications for the Appellant on his removal to Afghanistan. Article 8 was dealt with at length at paragraphs 64 - 80. The grounds amount to little more than a disagreement with the judge's findings which were properly open to him.
  4. The grounds do not disclose an arguable error of law”.

5. The application was renewed before the Upper Tribunal and in granting leave Upper Tribunal Judge Jordan gave the following reasons:
  - “1. The appellant, aged 26, has suffered from enduring mental health problems.
  2. I have not had the opportunity of considering the medical evidence in detail and, therefore, cannot say whether the First-Tier Tribunal Judge’s assessment of it is adequate.
  3. Given the fact that Judge Storey was obviously concerned about the case when he considered an application for judicial review and the appellant is currently admitted to a psychiatric unit, there are reasons why the Upper Tribunal should make an authoritative decision on his mental health and the consequences of removal”.
6. Thus the matter came before me in the Upper Tribunal.
7. In his submission Mr Joseph confirmed that the arguments were “threefold”. The judge had failed to consider adequately the totality of the medical evidence. He had cherry picked from various opinions to suit the outcome of the determination. The previous determination of Judge Phillips should have been the starting point. Whilst it was accepted that the judge had used that term, in reality he had not used that determination as the starting point. The appellant had never been to Afghanistan.
8. Mr Joseph indicated that Article 8 had been inadequately dealt with by Judge Whiting and there had been a failure to take into account comments made in the decision of Upper Judge Storey. The appellant’s situation had been considered on the narrower issues of suicide, rather than the appellant’s psychotic behaviour. Judge Whiting had not taken all the evidence in the round. The appellant had been sectioned under the Mental Health Act on two occasions. It was not sufficient to give him 6 months supply of drugs and merely arrange for somebody to meet him upon return. The necessary daily support was not available in Afghanistan. Judge Whiting had placed the appellant’s situation along with other Afghanistan mental health patients. The appellants specific difficulties related to the level of his illness, level of intervention needed, the fact he had never been to Afghanistan and that he would have no support whatever upon return, together with the length of time that he had spent in the United Kingdom. One piece of medical evidence was focused upon, which indicated the appellant did not suffer from a mental illness, whereas the respondents own conclusions (refusal letter) accepted that the appellant does have a mental illness and there is a possibility of being suicidal.
9. Mr Richards in his submission commented upon the detailed determination produced by Judge Whiting. The judge had considered the mental health issues (paragraph 9). With regard to the point about Judge Phillip’s determination being the starting point, Mr Richards pointed out that Judge Phillips had dismissed the appeal. Judge Whiting may not

have listed everything in the appellant's case, but he didn't need to. He has set out a comprehensive record and he directed himself appropriately. All findings have open to the judge who had undertaken a painstaking exercise for which he should be complimented. There was no material error of law.

10. In response Mr Joseph drew my attention to certain paragraphs within Upper Tribunal Judge Storey's decision notice.
11. At the end of the hearing I reserved my decision, which I now give with reasons.
12. Having considered in detail the determination of Judge Whiting, I have also considered the determination of Designated Judge Phillips and the comments made by Upper Tribunal Judge Storey. I have then considered the grounds seeking leave and the two decisions based upon those applications. I have noted the submissions made by each representative and, where appropriate, I have considered the medical evidence that was before Judge Whiting.
13. I find there has been no material error of law shown to exist in the determination of Judge Whiting. My reasons are set out below.
14. I would however comment on the circumstances in which this matter came before me. As indicated above, Judge of the First-Tier Tribunal Reid refused leave for the reasons set out above. Judge Reid concluded that there was no arguable error of law. The application was renewed on the same terms before the Upper Tribunal. My colleague in the Upper Tribunal granted permission and again I have set out his reasons. It is worthy of note that in granting leave the judge said "I have not had the opportunity of considering the medical evidence in detail and therefore cannot say whether the First-Tier Tribunal judge's assessment of it is adequate". I also note that he said "...there are reasons why the Upper Tribunal should make an authoritative decision on his mental health and the consequences of removal". No arguable error of law was identified and of course before I am able to make any decision on the appellant's mental health, and consequences of removal, I must identify an error of law within Judge Whiting's determination that was material to the outcome. I consider it of importance to focus upon the task before me. Also of importance is that I must not ask myself the question as to whether or not I agree with Judge Whiting's decision, but whether he made a material error of law in reaching that decision.
15. Mr Joseph very carefully and succinctly explained the basis of the appellant's application. Did Judge Whiting cherry pick the medical evidence? Did he properly deal with the determination of Designated Judge Phillips (and Upper Tribunal Judge Storey)? Finally did he properly deal with human rights considerations?

16. In summary I find that Judge Whiting did not cherry pick from the medical evidence. He did properly deal with decisions and determinations that had previously been taken in this matter, and he did properly deal with all relevant aspects of the European Convention on Human Rights. It is my view that Judge Reid was correct in refusing to grant leave because the grounds do indeed amount to little more than a disagreement with the judge's findings, with those findings being properly open to Judge Whiting.
17. It is of course necessary to read the whole of the 91 paragraph of Judge Whiting's determination as a whole. His assessment of the appellant's medical condition starts at paragraph 27, continues through paragraph 34 to 38 and then through paragraphs 41 through to 51. A reading of these paragraphs shows that Judge Whiting fully engaged with the medical evidence that was before him. The comments and findings made by Judge Whiting amount to a very fair summation of that evidence and the judge has properly directed himself with regard to how that evidence is assessed, and that once findings have been made, how they might relate to the appellants situation upon arrival in his country of nationality.
18. Judge Whiting has been criticised for placing too much reliance upon the views of Dr Mahdi, in that it contradicts the acceptance in the refusal letter of a mental health problem. However despite what is said in the refusal letter, Judge Whiting was entitled to go behind that, given the nature of the medical evidence that was before him. An important question is what is likely to happen upon arrival in Afghanistan. Judge Whiting engaged with that question and made specific findings (including paragraphs 57 and 58). The case of **GS** mentioned in paragraph 57 has of course now been brought before the Court of Appeal and the findings of the Upper Tribunal now have confirmation from the Court of Appeal.
19. I am therefore satisfied that Judge Whiting properly dealt with the medical evidence before him and that he reached conclusions to which he was entitled.
20. Dealing now with the challenge based upon the view of Judges Phillips and Storey. Judge Whiting was obliged to take Judge Phillip's determination as the starting point. At paragraph 9 Judge Whiting recalls that he has done that and he uses the words "which I adopt" before directing himself via the case of **Devaseelan**. Having stated that direction there is nothing to suggest that Judge Whiting departed from that direction. Judge Phillips did of course dismiss the appellant's appeal and I note that both he and Judge Whiting referred to an Administrative Court decision of Mr Justice Ouseley dealing with an age dispute involving this appellant. Judge Phillips was conscious that "there is no diagnosis and no prognosis". Putting, from the position of the appellant, the most favourable view of Judge Phillip's decision, it could be said that with such diagnosis and prognosis the appeal would have been allowed. That does not necessarily follow, but putting the appellant's case at its highest that

might be an argument. However Judge Whiting did have medical reports before which he carefully analysed before reaching the conclusion that he did in dismissing the appellant's appeal. In short, Judge Whiting properly directed himself as to the findings of Judge Phillips. He used it as a starting point to which he added, and reached conclusions, upon the medical evidence before him.

21. There is an argument that the judge erred in not taking into account the views of Upper Tribunal Judge Storey. Judge Whiting refers to that judgment and, to a limited extent, he quotes from it. Judge Storey was clearly not seeking to tie the hands of any judge hearing an appeal in the future. At the end of the judgment he says "I am far from saying that success before such a judge is inevitable....". Judge Storey offers an opinion that Judge Phillips found the appellant to be a vulnerable person with a history of mental illness and he says in the final sentence of paragraph 3 "a future Tribunal judge will be quite likely to attach significant weight to these observations". Clearly Judge Whiting did have regard to the mental condition of the appellant and a reading of the determination showed that he did attach significant weight, not only to Judge Phillips views, but also the evidence that was before him. That evidence was not before Judge Phillips.
22. I have considered the way in which Judge Whiting deals with the appeal under ECHR and in particular Article 8. This is dealt with from paragraph 64 on, wherein the judge has considered his assessment of the findings that he has made against the authorities that he has to follow and paragraphs 81 through 85 give a clear explanation of the conclusions that he reached. It is worth noting that paragraphs 77 and 80 draw upon the findings and conclusions of Judge Phillips, which again shows that Judge Whiting used that determination as a starting point on factual issues.
23. For all these reasons, I find that there is no material error of law contained within Judge Whiting's determination and the appellant's appeal is accordingly dismissed.

Signed

Date

Upper Tribunal Judge Poole