Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10462/2015

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre

On 22nd July 2019

Decision & Reasons Promulgated
On 6th August 2019

Before

UPPER TRIBUNAL JUDGE CHALKLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HAJI [H]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: *Mr Tan, a Senior Home Office Representative*
For the Respondent: *Mr P Draycott of Counsel instructed by Hoole & Co Solicitors (Brighton Street)*

REASONS FOR FINDING AN ERROR OF LAW.

1. The respondent is a citizen of Afghanistan and he appealed the decision of the respondent taken on 14th July 2015 to refuse to grant leave to remain having claimed asylum. The appeal was heard by First-tier Tribunal Judge Mark Davies on 30th January 2019 in Manchester. The judge refers to the respondent's immigration history as being "somewhat complicated". Apparently, the respondent had entered the United Kingdom on a visit visa

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and subsequently returned to Pakistan from where he had exited. He then arrived in the United Kingdom on 24th June, 2014 and claimed asylum. That claim was refused on 8th July, 2014 and his appeal was dismissed on 17th July, 2014. His appeal rights were exhausted by 28th July, 2014.

2. The respondent was then removed from the United Kingdom on 18th August, 2015. Application was made on his behalf for judicial review on 7th October, 2014. On 19th February 2017 Gilbart J held that the respondent's removal had been unlawful and the respondent was returned to the United Kingdom on 31st March 2015 when submitted further evidence.

3. The judge says at paragraph 15 of his determination that the basis of the respondent's case is set out in extensive documentation submitted by his representatives with letters dated 22nd January 2019 and 18th July 2018. The judge indicates that he has taken account of witness statements of the respondent and additional witnesses. In paragraph 16 of his determination, the judge says that he has also taken account of the medical evidence of Professor Cornelius Katona, consultant psychiatrist, dated 15th April, 2016 and the medical evidence of Gary Walker, cognitive behaviour therapist, dated 30th March, 2016. He also says that he has read and considered a skeleton argument submitted by the respondent's representative comprised in two documents dated 20th July, 2018 and 30th January, 2018. At paragraphs 17, 18 and 19 of the determination the judge said this:

> "17. This matter first came before me on 24th July 2018 when it had to be adjourned on the basis that the Presenting Officer, Mr Dillon, had prepared the case with regard to removal to Afghanistan whilst removal to Pakistan was an alternative raised by [Appellant]. The hearing was then adjourned and reserved for myself and Mr Dillon. Mr Dillon was not able to be present at the hearing on 30th January 2018 and the Home Office was represented by Mr Richardson.
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> 18. After discussions between the representatives and myself it was agreed that the hearing will proceed on the basis that the [respondent] who was a vulnerable witness, would not give oral testimony but would simply rely on his witness statements. Mr Richardson on behalf of the Home Office did not wish to cross-examine any of the additional witnesses and indeed I was content that they should simply rely on their written testimony.
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> 19. Mr Richardson was content that he simply relied on the contents of the refusal letter. Similarly Mr Draycott bearing in mind our discussions, simply relied on his skeleton argument."

4. The judge was thereby put on notice, therefore, that the contents of the refusal letter were relied upon by the Secretary of State. The judge made his findings at paragraphs 20 to 23. It is important that I set them out in full:-

> "20. In particular in this appeal, in reaching conclusions regarding Article 3, I have taken into account the medical evidence previously referred to but, I have read the up-to-date medical

evidence contained in the [respondent's] latest bundle which included a further psychiatric report by Professor Katona, a letter from Dr Dakashina-Murthi, a copy of the [respondent's] latest prescription and medical letters by Dr Ashraf, Dr Khan and CBT Therapist Walker.

21. I am satisfied, considering all the evidence that has been put before me and in particular the medical evidence previously referred to, that the lower standard of proof is satisfied in this appeal by the [respondent]. The evidence overwhelmingly indicates that if the [respondent] were returned to Afghanistan or Pakistan he will or may be subject to treatment which engages Article 3 in that it is reasonably likely he will be subjected to inhumane or degrading treatment. I reach that conclusion taking into account the [respondent's] immigration history. I take into account that he has previously been returned to Afghanistan and brought back by order of a High Court Judge. The evidence contained in the medical reports before me clearly indicate that the [respondent] has severe mental health difficulties and is a substantial suicide risk. I can envisage no circumstances in which the [respondent]could therefore be easily returned to Afghanistan or Pakistan taking into account his mental health and the support he receives from his family members in the United Kingdom.

22. I am also satisfied that the [respondent's]Article 8 rights are engaged in this matter which makes the [appellant's] decision unlawful. In coming to that decision I have taken into account the questions raised by Lord Bingham in the case of **Razgar**. The [respondent] has established a family and private life in the United Kingdom. That is particularly the case taking into account his mental health. The [appellant's] decision does interfere with the [respondent's] private and family life and it would have consequences of such gravity as to engage Article 8.

23. Whereas the [appellant's] decision may be in accordance with the law and for one of the reasons set out in Article 8 I would have found it not to be proportionate taking into account the [respondent's] state of health."

The judge allowed the appeal under Article 3. The judge makes no finding at all in respect of the asylum or humanitarian protection claims raised by the respondent, although it seems clear that the judge intended to allow it.

5. The Secretary of State for the Home Department raised four main grounds of challenge. The first suggesting that the consideration is inadequate and fails to properly engage with issues raised in the reasons for refusal letter and at the hearing in submissions. It makes reference to the fact that there was an earlier determination by Judge Walker and suggests that *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * UKIAT 00702* was not applied. The second claim suggests that various findings of fact have not been made. They are largely in respect of the respondent's asylum claim. It is also unclear what the judge's conclusions were in respect of the risk of inhumane and degrading treatment and how it led to him reaching the conclusions he did. The judge has failed to take

into account any of the arguments put forward by the respondent. The third challenge suggested that the judge does not acknowledge that in respect of medical claims the threshold is significantly high as established by the cases of *D* and *N* and at no time does the judge identify that he has applied the higher threshold in his consideration of the medical evidence or that the case of *J* was considered applying the six principles in relation to claims relying on suicide the risk. The fourth challenge suggests that in relation to Article 8 the judge has failed to identify the basis on which the assessment was made and not demonstrated that the balancing exercise has been completed showing what factors fall on which side of the balancing exercise. I need not concern myself any further ground because the judge did not allow the appeal under Article 8. He simply said in paragraph 23 that he would have found it not proportionate but he goes on simply to allow the appeal under Article 3. Quite why the judge did not allow the appeal under Article 8 is not clear but that has not been challenged by the respondent.

6. Mr Draycott addressed me at some length and accepted that the judge has failed to deal with the respondent's asylum claim or make any findings relevant to it. He suggested however that there was no reason why the judge's decisions in respect of the Article 3 and Article 8 appeals should not stand. The judge makes it clear in paragraph 16 that he has read and considered Counsel's skeleton argument. Counsel said that he had dealt in the skeleton argument with *J* and it is quite clear that the judge had considered and applied *J*. He again suggested that the Article 8 and Article 3 findings should stand.

7. Mr Tan reminded me that the Presenting Officer at the hearing before Judge Mark Davies had been content to rely on the refusal letter but the judge nowhere deals with the refusal letter. There has been no consideration at all of the Secretary of State's view of the respondent's asylum claim or his human rights claims. The tests that the judge is required to apply when considering *J* may well have been set out in Counsel's skeleton argument, but nowhere in his determination does the judge indicate that he has applied them. In relation to Article 3 it is not clear whether the Article 3 claim has been allowed by the judge on the basis of the risk to the appellant in respect of his treatment on return, or risk to the appellant because of his medical condition.

8. Mr Draycott relied on *KU (Pakistan)* [2012] EWCA Civ 107 and in particular on paragraphs 17 to 22 and suggested that the judge's findings were perfectly safe and should be preserved. So far as the first challenge is concerned the determination of Judge Walker was following an appeal which was heard in the Fast Track. He relied on *R (detention action) v First-tier Tribunal (Court of Appeal)* [2015] 1 WLR. He submitted that *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * UKIAT 00702* was irrelevant because the Fast Track system was found to be unfair and illegal and that the judge should have made his own findings in respect of the previous claim. In relation to ground 2, insofar as the respondent's protection claim was concerned Mr Draycott accepted that

there were no findings but, he submitted that part of the respondent's appeal could be remitted for a fresh hearing whilst at the same time preserving the judge's findings in relation to Articles 3 and 8. In respect of the third ground he told me that the skeleton argument contained reference to *J* and the test to be applied in suicide cases and the judge very clearly had regard to them.

9. I reserved my determination.

10. I have concluded having read and re-read the determination of Judge Davies cannot stand.

11. The judge has not demonstrated that he has given any consideration to the Secretary of State's view of the respondent's claims as set out in the reasons for refusal letter. The Home Office Presenting Officer indicated that he relied specifically on it and it was incumbent upon the judge to consider it and explain why he disagreed.

12. The judge has simply failed anywhere to deal with the respondent's asylum claim and he has made no findings of fact in respect of it. So far as the respondent's Article 8 claim is concerned the judge appears to have stopped short of allowing the appeal under Article 8, although he was content that it was engaged in respect of both the respondent's family and private life on the basis of the respondent's mental health. He found that the decision would interfere with the respondent's private and family life and would have consequences of such gravity as to engage Article 8. He believed that the decision might very well be in accordance with the law and for one of the reasons set out in Article 8, but says, "*I would have found it not to be proportionate taking into account the appellant's state of health*." What he did not do was to go on and actually allow the appeal. I believe that he intended to do so.

13. Nowhere does the judge refer to the decision of the Court of Appeal in *J* [2005] EWCA Civ 629. The judge has failed anywhere to remind himself of the six tests set out in that decision to apply them. I accept that Counsel may very well have set out *J* in full in his skeleton argument, but without actually saying he has considered and applied it I do not believe that it can be implied that he has considered and applied it. Similarly, he nowhere sets out the Secretary of State's position in respect of the respondent's claims. He does not say what the up-to-date medical evidence contained nor what the further letters and reports he had received say. He does not refer to the evidence which he says overwhelmingly indicates that if returned to Afghanistan or Pakistan the respondent "*will or may*" be subject to treatment which engages Article 3, nor is it clear from paragraph 21 of the determination what the risk is. Whilst later he refers to the medical reports indicating that the respondent has severe mental health difficulties and is a substantial suicide risk it is not clear whether this is the only risk to him or whether there might be other risks.

14. In relation to the Article 8 claim the judge does not demonstrate that he has actually conducted the proportionality exercise.

15. I have concluded that the determination should be set aside in its entirety and the matter remitted for hearing afresh before a Judge of the First-tier Tribunal other than First-tier Tribunal Judge Mark Davies.

Richard Chalkley
A Judge of the Upper Tribunal

26th July 2019