Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02428/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 October 2019	**On 28 October 2019**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

E B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. D Selwood, Counsel, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr. I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

Introduction

This is an appeal against the decision of Judge of the First-tier Tribunal Wylie ('the Judge') sent to the parties on 5 August 2019 by which the appellant's appeal against the decision of the respondent to refuse to grant him international protection was dismissed.

Judge of the First-tier Tribunal Andrew granted permission to appeal. In her decision she reasoned that only four of the six grounds advanced were arguable, namely grounds 3 to 6 but she failed to incorporate her intention to

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grant permission on limited grounds within the decision section of the standard document, where she simply stated, 'permission to appeal is granted'. There were no words of limitation and therefore the appellant has permission to argue all grounds: *Safi & Ors (permission to appeal decisions)* [2018] UKUT 00388 (IAC), [2019] Imm AR 437.

Anonymity

The Judge issued an anonymity direction. There was no request from the representatives to set aside this direction and so I confirm:

> Unless the Upper Tribunal or a court directs otherwise, no reports of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of the protection claim being known to the public.

Background

The appellant is an Albanian national who is aged 28. In 1999, when aged 8, he witnessed the murder of a member of his family who was a police officer. On the day in question the family member was off duty but sought to intervene when two groups started to shoot at each other. The incident led to the deaths of ten people. The applicant asserts that threats were made to kill him and his family if he revealed what he saw. Ongoing problems continued over time and the appellant states that he was subjected to extreme violence on at least nine occasions from members of a family connected to the incident resulting in multiple fractures and scars upon his body. Consequent to one attack in 2004 he was hospitalised for some three to four months.

He left Albania some time in 2009 or 2010 and lived in different European cities. He asserts that he was located by members of the family whilst living in Belgium, beaten and left lying on the ground. The appellant claims to have entered this country clandestinely in April 2011 and claimed asylum in October 2015 after having been encountered by immigration officials. He initially provided false documents, claiming that he was an Italian national. The respondent refused the application by means of a decision dated 26 February 2019.

Hearing before the FtT

The appeal came before the Judge sitting at Hatton Cross on 23 July 2019. She refused an adjournment request which was sought so as to permit the appellant the opportunity to instruct a psychologist for a cognitive assessment. Her reasoning is provided at [7] and [9] of her decision:

> 'I considered the request. I had regard to Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) and the over-riding objective of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. The asylum application had been made in October 2015, and an adjournment would mean that the appeal would not be dealt with for another six months, probably early in 2020. Further delay was unlikely to be in the interests of the appellant particularly having regard to his mental health.'
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> …
>
> 'I concluded that by treating the appellant as a vulnerable witness taking account of the Presidential guidance, the matter could be dealt with today on the evidence currently available. I confirmed with Ms Karbani that she would be aware of the sensitivities in her cross-examination, and that I would be pro-active in ensuring that the proceedings were in accordance with the guidelines. I therefore refused to adjourn the hearing to another date.'

Ms Fitzsimons, who represented the appellant before the Judge, provided an explanation as to why the appellant was not called to give evidence, recorded at [11] of the decision:

> 'When we reconvened, Ms Fitzsimons advised that, taking account of the reports of Dr Cohen and Dr Lohawala, the diagnosis of PTSD and symptoms of depression, struggles with memory and cognitive impairment, and weighing up the probative value of cross-examination with the interests of the appellant, she did not propose to call him to give evidence. Accordingly, the case was restricted to submissions only.'

I observe at this juncture that no judicial assessment was taken as to the applicant's decision not to give oral evidence in the absence of medical evidence opining that he was unfit to give evidence. Dr. Lohawala provides no opinion as to whether the appellant is fit to give evidence. The extent of Dr. Cohen's opinion is that the appellant's ability to give evidence and to be cross-examined in compromised: [76]. This is not the same as being unfit to give evidence and there appears to have been no exploration before the Tribunal by the appellant's counsel as to suitable means of presenting and considering oral evidence in light of the guidance of the Court of Appeal in *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123, [2018] 4 WLR 78. Both doctors were content to rely upon the information provided by the appellant in consultation. The failure to assess the appellant's failure to give oral evidence is a noticeable failing.

Having considered the evidence and submissions presented, the Judge concluded that she was not satisfied, taking into account of the lower standard of proof, that the appellant had established that he was involved in a blood feud with the opposing family, at [102]:

> 'The country expert Dr Tahiraj confirms that this family were notorious, and there were reports of criminal activity and political feud. It appears to me that he had fabricated his account of a blood feud with a notorious family from his area, in order to make a claim for asylum. I note that in this initial screening interview, when asked why he had come to the United Kingdom, he answered 'I wanted to come to UK because I like London not Albania.'

She determined in the alternative, at [103]:

> 'Even if there was a blood feud, the criteria laid out in *EH (blood feuds) Albania CG* [2012] UKUT 00348 (IAC) are not met. It may well be the case that his cousin 'KD' was a police officer shot when he was off-duty and trying to intervene in a dispute between the 'opposing family' and another group. It may well be the case that the appellant witnessed this shooting. However, I would have expected there to have been some press reporting of the incident, particularly since the appellant had said that ten people were killed in that incident. In any event, it would seem that the feud was between the 'opposing clan' and another group, and that the appellant's family were not involved. There would be no reason for revenge by the 'opposing clan' against the appellant's family as they are the family suffering the death of their member.'

Grounds of Appeal

Ms Fitzsimons drafted the grounds of appeal that are relied upon by the appellant and identified six complaints as to errors of law.

A failure to adjourn the hearing for a neuropsychological report.

A failure to lawfully assess the scarring evidence.

A failure to have regard to relevant medical evidence addressing PTSD.

Inadequate consideration of the impact of vulnerability.

Unfair selective reliance on one aspect of the screening interview without regard to other material considerations.

The assessment of risk failed to take account of material considerations as regard to country guidance experts' reports.

In granting permission to appeal JFtTl Andrew reasoned, at [2] - [7]:

> 'Ground 1: I do not find that the refusal to adjourn this matter is an arguable error of law. The Judge considered all the medical evidence that was before her including that the Appellant had cognitive difficulties and a further report showing this would be otiose.
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> Ground 2: The Judge accepted that the medical evidence of scarring was provided by reputable medical practitioners. However, this does not mean that the Judge should accept their evidence without considering it, which the Judge did at paragraph 95 of the decision, finding that there could be alternative reasons for scarring. Further,

> the Judge was right to comment that the report from Albania had not been before the medical experts.
>
> Ground 3: I accept that the Judge did not refer to the diagnosis of PTSD. Had he done so this may have influenced her decision in relation to credibility and I find that this is an arguable error of law.
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> Ground 4: I accept the Judge did not consider the Appellant's vulnerability and that this is an arguable error of law.
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> Ground 5: I accept that the Judge's reliance on a question in the screening interview is an arguable error of law.
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> Ground 6: I accept there is an arguable error of law in the Judge's consideration of the country guidance and expert reports and his assessment of risk.'

No Rule 24 response was filed by the respondent.

The Hearing

Following a brief discussion with the representatives, Mr Jarvis appropriately acknowledged that upon reappraising [92] and [97] pf the decision and reasons the Judge had not made clear findings as to whether or not she accepted the nature and essence of the appellant's cognitive impairment and therefore it is unclear as to whether there was appropriate consideration as to the diagnosis of memory loss when consideration was given to discrepancies in this matter. Mr Jarvis wished to observe that the decision was in the main very skilfully and carefully prepared and whilst it had been his intention to seek to defend the judgment, it was on this particular issue that he accepted on behalf of the respondent that the lack of clarity as to the consideration of vulnerability and the failure to clearly identify relevant guidance from the Court of Appeal judgment in *AM (Afghanistan)* meant that there was a material error of law.

Decision on Error of Law

I consider grounds 3 and 4 together as they overlap. When refusing to grant an adjournment the Judge reasoned, *inter alia*, at [8]:

> 'There was evidence that he had memory difficulties, and this would affect his ability to give evidence and be cross-examined. I did not consider that a formal cognitive assessment would be necessary to enable the appeal to be dealt with.'

The Judge observed at the outset of her credibility assessment that the appellant had been diagnosed with PTSD, at [66]:

> 'I take account of the appellant's mental health as set out in the two psychiatric reports, that he meets the diagnosis criteria for post-traumatic stress disorder and has symptoms of depression and post-concussive symptoms. He has poor memory, poor concentration,

> episodes of dizziness and possible seizures. I take into account that in 2017, and currently, his ability to recall and recount his experience was and is severely compromised. I have noted the description given by the legal representative at the first cancelled interview on 25 November 2015. At the time of his screening interview and his substantive asylum interview I accept that his ability to recall and recount his experiences was likely to be impaired.'

She further noted, at [67]:

> 'I take account of the statement by the caseworker from the appellant's solicitors in which she sets out the number of meetings with the appellant and the time spent with him in the preparation of the witness statement dated 4 July 2019, as well as the very lengthy meetings subsequent to the signing of the statement.'

The Judge appears to accept that the appellant suffers from PTSD, poor memory and poor concentration. She expressly considered that from at least 2017 the appellant has been identified as severely compromised as to his ability to recall and recount his experiences. In such circumstances, she was required to consider the guidance of the Court of Appeal in *AM (Afghanistan)* at [21] and [22] of the judgment and though there is no exhaustive or immutable checklist the following principles are applicable:

there is a lower standard of proof;

assessments of personal credibility are not a substitute for application of the criteria for refugee status which has to be holistically assessed;

medical experts' findings have to be treated as part of the holistic assessment, not as an 'add-on';

medical evidence can be critical in explaining why an account might be incoherent and inconsistent;

credibility has to be judged in the context of the known objective circumstances and practices of the relevant state;

the highest standards of procedural fairness are required.

There is no express reference to the Court of Appeal judgment within the Judge's decision, nor express reference to the identified principles. This is not a material error of law *per se* but the Judge runs a real risk of materially erring in law if he or she does not have the principles clearly in mind when assessing a claim by a vulnerable person.

Having noted the appellant's health concerns, the Judge proceeded to undertake a credibility assessment and gave several reasons for not believing elements of his stated history. Certain adverse findings were capable of being made independent of any consideration of the appellant's mental health, primarily as to evidence from the appellant's father presented by means of a letter. However, several other adverse findings were made as to the appellant's evidence where there was a requirement to consider his health concerns, for example at [92], [96] - [98]:

> ‘It appears to me that his cognitive impairment, were it to have existed before 2015, did not prevent him from managing to live, obtain false papers, and presumably work in a country foreign to him for over four years.’
>
> …
>
> ‘It appears to me that the appellant is a young man with a history of fighting. The injuries he has sustained are likely to be resulting from this behaviour.
>
> He has a mental health condition, and it appears that this was diagnosed before the age of eighteen by Albanian medical practitioners. Despite his mental disorder, he was able to cope with travelling throughout Europe and clandestinely entering the United Kingdom, and then to live for a number of years without coming to the attention of the authorities.
>
> He had claimed that he was at risk because of a relationship with a niece of one of the leading members of the opposing clan, but he could not remember her name. However, he was able to remember the names of other girls with whom he claimed relationships causing him ill-treatment by their families.’

In progressing through her credibility assessment, the Judge does not return to the diagnosis of PTSD and memory loss and so fails to conduct a holistic assessment. The consideration of medical evidence relevant to credibility is an important part of the process undertaken to reach a conclusion as to credibility and an artificial separation of the medical evidence from the rest of the evidence when reaching such conclusions is a structured failing, not just an error of appreciation. There is no express consideration to the mental health diagnosis post [66] and so no express assessment as to whether such concerns attributed to the lack of consistency found in later paragraphs. It could be open for a Judge to take into account the medical evidence presented in this appeal and reasonably find on the lower standard that the appellant cannot establish his claim consequent to a holistic assessment but such consideration must be lawful and be in accordance with the principles identified in *AM (Afghanistan)*.

Despite the clear efforts of the Judge to carefully consider the appeal before her the failure to assess the materiality of the appellant’s PTSD when rejecting his credibility strongly suggests that the relevant principles were not applied and so the Judge materially erred as to her assessment of credibility and the only appropriate course available is for this decision to be set aside. I am therefore not required to consider grounds 1 to 2 and 5 to 6.

Remittal

As to remaking the decision, given the fundamental nature of the error of law that has been identified, I have considered the submissions made by both Mr Sellwood and Mr Jarvis that clear findings of fact have yet to be made in this matter and to date there has been no careful consideration given to the

medical evidence presented to the Tribunal. Both representatives submitted that the appeal should be remitted to the First-tier Tribunal.

I have given careful consideration to the Joint Practice Statements of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal, which reads as follows, at [7.2]:

> 'The Upper Tribunal is likely on each such occasion to proceed to remake 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
>
> (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.'

I have reached the conclusion that it is appropriate to remit this matter to the First-tier Tribunal for a fresh decision on all matters. The appellant has not yet enjoyed an adequate consideration of his asylum claim to date and has not had a fair hearing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 5 August 2019 pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

This matter is remitted to the First-tier Tribunal for a fresh hearing before any Judge other than Judge Wylie. No findings of fact are preserved.

The anonymity direction is confirmed.

Signed: D. O'Callaghan

Upper Tribunal Judge O'Callaghan

Date: 24 October 2019