Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: PA/07560/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 5 April 2019	**On 7 May 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

HS
(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Draycott (Counsel)
For the Respondent: Mr M Diwnycz (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a Judge of the Upper Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on 20 July 2018, following a hearing of 17 July 2018, and which it sent to the parties on 24 July 2018. The tribunal's decision was to dismiss the claimant's appeal against a decision of the Secretary of State made on 1 June 2018, refusing to grant the claimant international protection.

2. Shorn of all of the essentials, the background circumstances are as follows: The claimant is a national of Afghanistan and he was born on 1 January 1959. He resided in the Helmand Province in Afghanistan. But on 6 February 2009 he entered the United

Kingdom (UK) and he claimed asylum. On 24 September 2009 the Secretary of State refused his claim. He appealed to the tribunal but, on 18 November 2009, his appeal was dismissed. He did not leave the UK, despite the dismissal of his appeal, and in due course further representations were made on his behalf to the Secretary of State. Ultimately, that resulted in the Secretary of State deciding to refuse to grant international protection and that, in turn, led to the hearing before the tribunal and its dismissal of his appeal. In asserting entitlement to international protection, the claimant said that if he were to be returned to Afghanistan he would be persecuted or seriously ill-treated by the Taliban and the Afghani authorities. It was also contended, on his behalf, that he could not return to Helmand Province because if he did, he would be at risk of indiscriminate violence due to an internal armed conflict so that he satisfied the requirements, contained within Article 15c of Council Directive 2011/95/EU. The claimant also argued that, given his health difficulties, he would be at risk of committing suicide such that he could successfully rely upon Article 3 of the European Convention on Human Rights (ECHR). Further, he asserted that he would not be able to take advantage of an internal flight alternative within Afghanistan and that that was so, in part at least, due to those mental health difficulties. He also sought to rely upon Article 8 of the ECHR in the context of private life and what was described as his "mental integrity".

3. It follows from the above that the tribunal was tasked with considering a whole range of arguments. Indeed, it was provided with a skeleton argument addressing those matters which ran to some twenty-nine pages. The tribunal's written decision, unsurprisingly therefore, was lengthy too. It ran to thirty-two pages. As noted, the tribunal dismissed the claimant's appeal. It found the account he had relied upon to be untruthful and it found that the medical evidence did not demonstrate that there was a real risk of him committing suicide if returned to Afghanistan. It accepted that he could not return to Helmand because of the Article 15c risk but it concluded he could internally relocate either to Kabul or to a place called Pakyta where it concluded his wife was residing.

4. The grounds of application for permission to appeal to the Upper Tribunal were extensive and a wide range of points were taken. I have not found it necessary to deal with all of them. But I would like to say, at this stage, that in general terms it seems to me that the tribunal undertook a most careful and thorough evaluation of the evidence and the extensive and sometimes difficult arguments which had been made to it. Permission to appeal was originally refused by a judge of the First-tier Tribunal but was subsequently granted by a judge of the Upper Tribunal who relevantly said this:

> "It is arguable that the F-tT J took an incorrect approach to the medical evidence and that this may have had a material impact on the conclusions, for example that the appellant could relocate on return to Afghanistan and be expected to find work on return".

5. Permission having been granted the case was listed for a hearing before the Upper Tribunal (before me) so that it could be decided whether or not the tribunal had erred in law and, if it had, what should flow from that. Directions also facilitated the possible remaking of the decision by the Upper Tribunal should that be necessary or appropriate. Representation at that hearing was as stated above and I am grateful to each representative. Mr Draycott, for the claimant, provided me with a bundle of authorities and other materials which was helpful. His having taken me through various of the arguments contained in the grounds, Mr Diwnycz indicated that he would accept the tribunal's decision did contain an error of law. That has circumvented matters somewhat.

6. The tribunal, as noted, did accept that the claimant was unable to return to his home area (indeed the Secretary of State had accepted that that was so) due to the Article 15c risk. So, it was necessary for it to consider whether he could take advantage of an internal flight alternative (see paragraph 71 of the tribunal's written reasons). It decided it would not be unduly harsh to require him to relocate to Kabul or to Pakyta. One of the matters it considered with respect to internal flight was the claimant's mental health. It had before it the previous decision of the tribunal which had been made in 2009. But it also had a large volume of documentary medical evidence concerning the claimant's medical health which had been produced after that tribunal decision had been made. So, although the principles set out in the well known case of *Devaseelan* [2001] UKIAT 702 applied, it was able to reach its own view as to the nature and extent of the mental health difficulties on the basis of that more recent evidence. What is said about mental health in the specific context of relocation is this:

> Whilst the appellant does suffer medical problems, I do not accept upon the evidence before me that he is not capable of work. I note that he has experience as a mechanic. I am therefore satisfied that if he was to return to Afghanistan he would be able to support himself by obtaining employment or commencing self-employment upon which he will earn money to support himself and to purchase suitable medication".

7. Pausing there, there was also evidence of physical health problems but I think the tribunal probably had in mind, primarily at least, the mental health difficulties. Anyway, its assessment as to internal flight and the relevance of the mental health difficulties in that context, was the subject of criticism in the grounds.

8. Mr Draycott referred, in particular, to a psychiatric report which had been prepared by one Professor Katona on 16 October 2013. I note that in that report (page 7) it is said that the claimant is suffering from post-traumatic stress disorder and "major depressive episode". A component of Mr Draycott's argument was to the effect that in the Secretary of State's written decision of 1 June 2018, it had been accepted that those diagnoses were correct. Mr Draycott suggested that that was apparent from what was said at paragraph 61 and paragraph 63 of that decision. But the tribunal, it was argued, had effectively disregarded what had amounted to a concession as to all of that when it decided that the claimant's mental health difficulties were not sufficient to impact upon his ability to internally relocate.

9. I do not read those paragraphs in the way that Mr Draycott argues I should. It seems to me that the point being made at paragraph 61 is that a number of medical practitioners, including Professor Katona should not have unquestioningly accepted the historical account that the claimant has given. That reasoning might well be subject to some criticism but I cannot see that it constitutes any acceptance of what Professor Katona had to say. As to paragraph 63 that, at best, might amount to an implied acceptance of some degree of medical difficulty but is very far from amounting to an acceptance of any specific medical diagnosis.

10. Having said the above, and although the medical evidence regarding mental health problems was not all that recent (the most recent having been prepared in 2016), it was capable of suggesting mental health problems of real substance. The tribunal did give specific consideration to Professor Katona's evidence albeit more in the context of the claim regarding suicide risk. It said it accepted "that the appellant has a history of PTSD" though it also said that it was reducing the weight it should attach to the report because of

its age and because it was based on one consultation. But in my judgment, whatever it did or did not make of the suicide risk contention, it was obliged to make a finding as to the nature and extent of any mental health difficulties insofar as they impacted upon the reasonableness of internal flight as at the date it was hearing the appeal. It did not actually do that. I suppose it might have been open to it (my not having accepted Mr Draycott's submissions regarding a concession by the Secretary of State) to have said that the primary medical evidence was simply too dated to be informative as to the current position. But it did not do that. I have concluded, therefore, that the tribunal did err in not adequately considering the evidence regarding mental health problems and in not making clear findings about their nature and extent, when considering the reasonableness or undue harshness of relocation either to Kabul and/or to Patyka. It also seems to have limited itself, as to its evaluation of these problems, to the impact they might have upon the claimant's capacity to work. That was too narrow an approach. So, and reminding myself that setting aside was not opposed on behalf of the Secretary of State, I have concluded that I should set aside the tribunal's decision notwithstanding the obvious diligence which it brought to its task.

11. I did wonder whether I should simply go on to remake the decision myself on the basis of the material currently in front of me. However, I have decided that I should not do that. It does seem to me that there is scope for further findings to be made with respect to the current state of the claimant's mental health and that that is a task best undertaken by the tribunal which is, after all, the expert fact-finding body in this field. Remitting will also afford the claimant, if wished, an opportunity to obtain more up to date medical evidence.

12. I have considered whether I should preserve some of the tribunal's careful findings of fact. I have decided not to do so because, having taken the decision to remit, it does seem to me that I should allow the tribunal to make what it will of all of the evidence and the arguments in this case without my effectively placing it in a straightjacket. So, I have decided to remit for an entirely fresh hearing where all matters of fact and law will be considered anew.

13. Since I have set aside the tribunal's decision and decided to remit I am now statutorily obligated to issue directions for the remaking of the decision. However, I shall merely direct, as to that, there shall be an oral rehearing of the appeal, that all matters shall be decided afresh, and that the tribunal rehearing the appeal shall be differently constituted to the tribunal which dismissed the appeal. Any other directions regarding listing and the provision of further evidence can be best dealt with by the tribunal itself.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside. Further, the case is remitted to the tribunal for a complete rehearing.

Anonymity

The First-tier Tribunal granted the claimant anonymity. I continue that grant pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, no report of these proceedings shall identify the claimant or any member of his family. The grant of anonymity applies to all parties to the proceedings. Failure to comply may lead to contempt of court proceedings.

Signed: Dated: 2 May 2019

Upper Tribunal Judge Hemingway