Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: PA/05031/2019

THE IMMIGRATION ACTS

Heard at	Field House	Decision & Reasons Promulgated
On	26 February 2020	10 March 2020

Before

Upper Tribunal Judge Gill

Between

FARHAD [N] Appellant

(ANONYMITY ORDER NOT MADE)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Respondent

Representation:

For the appellant: Ms Z Harper, of Counsel, instructed by Birnberg Peirce & Partners
For the respondent: Ms A Everett, Senior Presenting Officer.

Decision and Directions

1. This is an appeal against a decision of Judge of the First-tier Tribunal Abebrese who, following a hearing on 11 October 2019, dismissed the appellant's appeal against a decision of the respondent of 16 May 2019 to refuse his asylum, humanitarian protection and human rights claims of 14 March 2018.

2. There were five grounds of appeal. It is only necessary to mention the following:

   i) Ground 1: This ground advanced three separate points but it is only necessary to mention the first which may be summarised as follows: The judge did not consider the medical evidence in reaching his conclusions on the appellant's credibility, rejecting the corroborative value of the medical evidence after deciding that the appellant's account lacked credibility.

ii) Ground 4: The judge erred in his consideration of the risk of suicide, in that, he made no findings on the evidence regarding the appellant's psychiatric condition, failed to consider that evidence with reference to J v SSHD [2005] EWCA Civ 629, failed to provide reasons for his conclusion that the impact of removal on the appellant's mental health would not reach the threshold for Article 3 and Article 8 and failed to make sustainable findings on the availability of treatment in Afghanistan to mitigate the risks to his mental health.

3. At the hearing before me, Ms Everett agreed that the judge had erred in law, as summarised above in relation to grounds 1 and 4, as well as 2 and 5 as set out in the written grounds and not summarised above. She accepted that the errors of law were material and, in particular, that ground 1 was fatal to the judge's credibility assessment. She accepted that the judge's decision fell to be set aside in its entirety. In her view, the appeal should be remitted to the First-tier Tribunal. Ms Harper also requested that the appeal be remitted to the First-tier Tribunal.

4. I agree that the judge had erred in law as contended in grounds 1, 2, 4 and 5. In relation to the ground as summarised at para 2.i) above (one of the three grounds raised in ground 1), the judge considered various credibility points at paras 26-32 and then said, at para 33 as follows:

> "33. Therefore on the basis of the above findings the appellant's account of the incidents with the Taliban are not accepted and I am of the view that any specific threats relate to [the appellant's brother] and not to the appellant."

5. At para 36, the judge said:

> "36. I consider all of the medical evidence provided by the appellant and I am of the view that due to lack of credibility of the core of the appellant's account that they do not corroborate the appellant's claim."

6. It is therefore plain, from paras 26-36 of the judge's decision that he reached his adverse credibility findings on the appellant's accounts of the basis of his asylum claim without taking into account the medical evidence and that, having reached his adverse credibility findings, he rejected the potentially corroborative value of the medical evidence. He therefore put the cart before the horse and committed the same error as did the Special Adjudicator in R v Special Adjudicator, ex parte Virjon B [2002] EWCA Civ 1302, an authority referred to in the grounds. A more recent and better known authority is the Court of Appeal's judgment in Mibanga [2005] EWCA Civ 367 in which the Court of Appeal said that the judge in that case had used her adverse credibility findings as justification for dismissing the medical evidence.

7. Taken on its own, this part of ground 1 is fatal to the judge's credibility assessment in relation to the appellant's protection claim, irrespective of the merits of the remaining grounds.

8. In relation to ground 4, the judge considered the appellant's human rights claim based on his medical condition at para 42, the relevant part of which reads:

> "42. … I am also of the view that the appellant has not established a claim under Article 3 of ECHR and that the report of Dr. Guistozzi does indicate that medical treatment is available to the appellant in Afghanistan even though they may not be of the same standard and less widespread throughout the country. I referred myself to paragraph 78-90 of the report. The appellant could also relocate to Kabul and the central highlands of the country the appellant would face high cost of living and difficulties in employment nevertheless these are options for him. I referred myself to paragraphs 75-77 of the report."

9. It is not enough for the judge simply to have said that he had referred himself to various paragraphs of Dr. Guistozzi's report without explaining how Dr. Guistozzi's evidence featured in his consideration of the report of Dr Neil Egnal concerning the appellant's mental health condition and the risk of suicide and how he had applied the Court of Appeal's guidance on this issue in J v SSHD.

10. Ground 4 is therefore plainly established. It is fatal to the judge's assessment of the appellant's Article 3 claim based on his medical condition and his related Article 8 claim.

11. It follows that the whole of the judge's decision stands to be set aside. I therefore set aside the decision of Judge Abebrese in its entirety. It is therefore necessary for the decision on the appeal to be re-made on the merits on all issues.

12. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it 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 re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

13. Given the evidence filed in this case, in particular the expert reports including the medical evidence, I agree with the parties that the nature and extent of the judicial fact-finding that is necessary is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside. This case is remitted to the First-tier Tribunal for the decision on the appellant's appeal to be re-made on the merits on all issues by a judge other than Judge of the First-tier Tribunal Abebrese.

Signed Date: 27 February 2020
Upper Tribunal Judge Gill