Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00560/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th December 2021	**On the 23rd December 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

M S A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms D Revill, Counsel instructed by Ata & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. An anonymity direction has previously been made by First-tier Tribunal Judge Head and as the appeal concerns a claim for asylum and international protection, it is appropriate for the anonymity order to be continued under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. MSA is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This

direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to Contempt of Court proceedings.

2. The appeal was listed before me as a Case Management Review Hearing for me to determine as a preliminary issue, the decision of the First-tier Tribunal that is the subject of the appeal before the Upper Tribunal, and, in light of my decision upon that issue, whether permission should be granted to rely upon any further grounds of appeal advanced by the appellant. At the outset of the hearing before me, Mr Tufan confirmed on behalf of the respondent that the appellant's claim has now been reviewed by a senior caseworker and the respondent accepts the decision of the First-tier Tribunal to refuse the appeal on international protection grounds is vitiated by a material error of law. He accepts the decision should be set aside, and he concedes that in re-making the decision, on the particular facts and in light of the current country information, the appeal can be allowed on asylum grounds. In the circumstances, the parties agree that in addition to determining the primary issue, I should determine the appeal before the Upper Tribunal by setting aside whichever decision of the First-tier Tribunal is the subject of the appeal before me, and to remake the decision allowing the appeal.

The background

3. The appellant is an Afghan national whose claim for international protection was refused by the respondent on 31st January 2020. The appellant appealed that decision, and the appeal was heard by First-tier Tribunal Judge Head sitting at Hatton Cross on 5th January 2021. The appellant was represented at that hearing by counsel, Ms Revill, who has subsequently been instructed in relation to the appeal to the Upper Tribunal.

The preliminary issue

4. It is common ground between the parties that a 'Decision and Reasons' were promulgated on 1st February 2021. Both parties were sent a copy of and received that decision. The Tribunal file records that on 3rd February 2021, the parties were sent an Amended Notice that had attached to it, a decision of Judge Head promulgated on 3rd February 2021. The Notice was received by the respondent, but not, it seems, by the appellant's representatives. The Notice has attached to it a label that states "***IMPORTANT*** AMENDED NOTICES. PLEASE DISREGARD ALL PREVIOUS NOTICES". I will return to those two decisions shortly.

5. The appellant's representatives filed an application for permission to appeal to the Upper Tribunal in the usual form IAFT-4, dated 15th February 2021. In section B, they identify the date of the First-tier Tribunal determination to be 1st February 2021. The grounds relied upon, are set out in a document titled "Application for Permission to appeal to the Upper Tribunal" settled by Ms Revill and dated 12th February 2021. Four grounds of appeal are advanced.

6. Permission to appeal was granted by First-tier Tribunal Judge Scott-Baker on 4 March 2021. In setting out her reasons, at paragraph [1] she said:

> "1. The appellant seeks to appeal against a decision of the First-tier Tribunal (Judge Head) who, by decision and reasons promulgated on 3 February 2021 *(my emphasis)*, dismissed the appellant's appeal against the decision of the respondent made on 30 December 2019…"

7. Permission having been granted; the appeal was listed for hearing before me on 10th August 2021. During the course of the hearing it became apparent that Ms Revill was unaware of the decision promulgated by the First-tier Tribunal on 3rd February 2021, and I was informed that a copy of that decision had not been received by the appellant's representatives. At the hearing it was identified that at paragraph [72] of the decision promulgated on 3rd February 2021 it is said; *"… Ms*

Revell accepted that the appellant's antidepressant medication is available in Afghanistan, and it was not suggested that his medication would be inaccessible …". Ms Revill claims that contrary to what is said in the decision of 3rd February 2021, the appellant's case was that although the medications required by the appellant are available in Afghanistan, it was unlikely that the appellant would be able to access them in practice, due to a lack of mental health facilities in Logar, limited supplies in the country as a whole, unaffordability, and the prevalence of counterfeit medication. In her skeleton argument that was before the First-tier Tribunal, an express distinction was drawn between availability, which was accepted, and accessibility, which was not. At the hearing on 10th August 2021, Ms Revill raised concerns regarding the jurisdiction of the Upper Tribunal to consider the appeal as an appeal against the decision promulgated on 3rd February 2021. Directions were made for that issue to be determined at a Case Management Hearing.

8. In considering the preliminary issue regarding the decision of the First-tier Tribunal that is the subject of the appeal before me, I have been assisted by written submissions dated 23rd August 2021 settled by Ms Revill and submissions set out on behalf of the respondent in writing dated 2nd September 2021. In view of the concession made before me by Mr Tufan regarding the ultimate outcome of this appeal, neither party sought to elaborate upon the written submissions.

9. In broad terms, the appellant submits the only appeal before the Upper Tribunal is an appeal against the decision of First-tier Tribunal Judge Head promulgated on 1st February 2021. The appellant submits the decision promulgated on 1st February 2021 was the only decision the appellant and his solicitors were aware of, and the only decision identified in the Application for Permission to Appeal and accompanying grounds of appeal. The appellant submits the decision promulgated on 3rd February 2021 was in effect, a decision reached after the First-tier Tribunal Judge was no longer seized of the appeal because the Judge

had become *functus offico* and the decision was one that was made without jurisdiction. The appellant submits the decision should be treated as a nullity or set aside for want of jurisdiction.

10. The appellant submits there is nothing in the decision promulgated on 3rd February 2021 to indicate the First-tier Tribunal Judge intended to apply the slip rule set out in Rule 31 of the First-tier Tribunal (Immigration and Asylum Chamber) Rules. The rule permits the Tribunal to correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it. The appellant submits the decision promulgated on 3rd February 2021 is not merely the correction of an error of expression or typographical error, but in fact seeks to introduce a substantive change to the Judge's reasoning. It is said the decision adds additional reasons for dismissing the appeal, properly characterised as a 'second or additional thought'.

11. The respondent submits that having identified an omission in paragraph [72] of her decision, Judge Head corrected the accidental slip or omission under Rule 31. The respondent submits the decision promulgated on 1st February 2021 was therefore superseded by the amended decision promulgated on 3rd February 2021. The respondent refers to the grant of permission to appeal which plainly proceeds upon the basis that permission to appeal is granted in respect of the challenge to the decision and reasons promulgated on 3rd February 2021.

12. Before turning to the submissions, it is helpful for me to say a little more about the two decisions promulgated by the First-tier Tribunal. Neither I, nor it seems the parties, have carried out a comparison of the precise text of each of the two decisions, but as I have already set out, there is at least one material difference at paragraph [72] of the two decisions. Paragraph [72] of the decision promulgated on 1st February 2021 states:

> "72. I find that the appellant would be able to return to his home in Logar where both his uncle and mother reside. I find that there is no credible reason advanced why the appellant cannot turn to his family members in Afghanistan to offer him any support he may need. Ms Revell accepted that the appellant's antidepressant medication is available in Afghanistan, and I find that the appellant will be able to continue to access this medication. *(my emphasis)* I note that the appellant's brother in the UK has housed and financially supported the appellant for a number of years and as such, I find that he can continue to assist the appellant with financial assistance if required…."

13. Paragraph [72] of the decision promulgated on 3rd February 2021 states:

> "I find that the appellant would be able to return to his home in local art where both his uncle and mother reside. I find that there is no credible reason advanced why the appellant cannot turn to his family members in Afghanistan to offer him any support he may need. Ms Revell accepted that the appellant's antidepressant medication is available in Afghanistan, and it was not suggested that his medication would be inaccessible. I find that the appellant will be able to continue to access this medication. *(my emphasis)* I note that the appellant's brother in the UK has housed and financially supported the appellant for a number of years and as such, I find that he can continue to assist the appellant with financial assistance if required…."

14. Although not referred to by either party, at the hearing before me, I informed the parties that having read the two decisions, although the structure and reasons are in substantial part the same, there do appear to be other differences between the two decisions. The decision promulgated on 1st February 2021 runs to some 134 paragraphs. At paragraphs [12] and [13], Judge Head refers to the 'scope of the appeal' and the issues that arise. The respondent's case is summarised at paragraph [14]. Judge Head refers to the evidence that was before the Tribunal at paragraphs [15] to [18] of her decision. Her decision and reasons are set out at paragraphs [29] to [134]. A summary of the conclusions reached by the judge are set out in paragraphs [132] to [134] of her decision. There follows what is headed 'Notice of Decision' in which it is recorded that the appeal is dismissed on asylum grounds, dismissed on humanitarian protection grounds, and dismissed on human rights grounds.

15. The 'Decision and Reasons' of Judge Head promulgated on 3rd February 2021 runs to some 133 paragraphs. Again, at paragraphs [12] and [13],

Judge Head refers to the 'scope of the appeal' and the issues that arise. The respondent' case is again summarised at paragraph [14]. Judge Head refers to the evidence that was before the Tribunal at paragraphs [15] to [18] of her decision. Her decision and reasons are set out at paragraphs [29] to [133]. A summary of the conclusions reached by the judge are set out in paragraphs [131] to [133] of her decision. There follows what is headed 'Notice of Decision' in which it is, again, recorded that the appeal is dismissed on asylum grounds, dismissed on humanitarian protection grounds, and dismissed on human rights grounds.

16. What is immediately apparent is that the decision promulgated on 3rd February 2021 comprises of 133 paragraphs, whereas the decision promulgated on 1st February 2021 comprised of 134 paragraphs. Although I have not carried out a comparison of the precise text of each of the two decisions, having read the two decisions, it is clear that it is at the point at which Judge Head was considering the Article 3 claim, that the changes appear. In the decision promulgated on 3rd February 2021, Judge Head appears to add, at paragraph [84]:

> "84. Accordingly, the next question for me to consider is whether the appellant has adduced evidence capable of demonstrating that there were substantial grounds for believing that Article 3 would be violated if he were returned to Afghanistan."

17. At paragraphs [107] to [110] of the decision promulgated on 1st February 2021, Judge Head had said:

> "107. Ms Revell submitted that the respondent has not adduced any material capable of dispelling the concerns raised by the appellant. However, as set out above, I do not accept that the appellant has adduced evidence, showing that there are substantial grounds for believing that he would be at risk of suicide on return.
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> 108. I do not find that the consequences of the decision to remove the appellant will have such a deleterious effect on his mental health as to constitute a level of suffering contrary to Article 3. I do not accept that he would face an imminent or rapid experience of intense suffering upon return, or that he would be unable to access any necessary treatment due to his conditions. As I have found above, the appellant would not be returning

without support, and I find no reason to conclude that he would be unable to access any relevant treatment if he so requires.

109. I acknowledge that the appellant will be anxious about returning to Afghanistan, however I do not find that his particular circumstances indicate that he would face a real risk of serious harm on return, nor am I satisfied that the appellant's mental health and the effects are such, that they would constitute treatment that would reach the threshold required to breach his rights under Article 3.

110. When assessing her claim and whether it meets the high threshold required by in N v UK, I find that it does not. Suffering from depression and taking medication for it is not an exceptional circumstance or a serious mental health issue meeting this high threshold. Accordingly I do not accept that his removal would breach Article 3."

18. However in the decision promulgated on 3rd February 2021, Judge Head states:

"108. Ms Revell submitted that the respondent has not adduced any material capable of dispelling the concerns raised by the appellant. However, as set out above I do not accept that the appellant has adduced evidence, showing that there are substantial grounds for believing that he would be at risk of suicide on return.

109. I find that the appellant has not discharged the burden to the appropriate lower standard that there is a real risk, as I have found above, the appellant would not be returning without support, and I find no reason to conclude that he would be unable to access any relevant treatment if he so requires. I acknowledge that the appellant will be anxious about returning to Afghanistan, however I do not find that his particular circumstances indicate that he would face a real risk of serious harm on return, nor am I satisfied that the appellant's mental health and the effects are such, that they would constitute treatment that would reach the threshold required to breach his rights under Article 3."

19. The difference between the two decisions is that in essence, what was said in paragraphs [108] to [110] of the decision promulgated on 1st February 2021, is amended or corrected to what is said in paragraph [109] of the decision promulgated on 3rd February 2021.

20. In AS (Afghanistan) v SSHD [2019] EWCA Civ 208, the Court of Appeal considered the circumstances in which the Upper Tribunal can correct errors in the reasons which it gives for its decisions. The Court of Appeal considered Rule 42 of the of the Tribunal Procedure (Upper Tribunal) Rules 2008, but at paragraph [33] of his judgement, Lord Justice

Underhill referred to the powers available to the First-tier Tribunal and said:

> "33. I note in this connection that Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 permits the correction of "any … accidental slip or omission in a decision, direction or any document produced by it". Whatever "decision" might cover if it stood alone, the italicised words appear to put it beyond doubt that the power extends to the written reasons for any decision. The TPC thus regarded it as desirable in that context that the slip rule should not be limited to formal decisions. It would be odd, to put it no higher, if we were to give rule 42 a construction which produced a different result in the Upper Tribunal."

21. Therefore, the power under Rule 31 extends to the written reasons for any decision. The rule does not apply where the error is substantial. That is, where the amendment amounts in effect, to the judge having second thoughts on an issue. It is the distinction between whether the First-tier Tribunal Judge was having second thoughts or intentions, or simply correcting the decision, which is the issue here. If Judge Head simply assessed the evidence wrongly or misconstrued or misappreciated the law, the resulting decision is erroneous, and cannot be corrected under Rule 31, and the remedy is an appeal. If however, what she was doing was to correct an accidental slip or omission, including to the written reasons for her decision, that is permitted by Rule 31.

22. I have already identified what are in essence the main differences between the two decisions of the First-tier Tribunal Judge. They concern the consideration of the Article 3 claim advanced by the appellant. In my judgement on a careful reading of the two decisions, Judge Head was not having second thoughts upon a particular issue or introducing new considerations into her decision but was correcting a slip and correcting her expression of the findings made, in her decision promulgated on 1st February 2021 in a way permitted by Rule 31.

23. At paragraphs [28] of both decisions, Judge Head refers to the country guidance set out in AS (Safety of Kabul) Afghanistan CG, and more importantly, sets out the legal framework for an Article 3 claim, referring to the decision of the Supreme Court in AM (Zimbabwe) v SSHD [2020]

UKSC 17. Judge Head addressed the Article 3 claim at paragraphs [81] to [110] of her decision promulgated on 1st February 2021 and at paragraphs [81] to [109] of her decision promulgated on 3rd February 2021. At paragraph [83] of both decisions, Judge Head confirms she has considered and applied the guidance of the Supreme Court in AM (Zimbabwe). In the amended decision promulgated on 3rd February 2021, Judge Head:

a. At paragraph [83], simply corrected and properly expressed the test referred to by the Supreme Court noting that it is for the appellant to adduce evidence capable of demonstrating that there is a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or a significant reduction in life expectancy.

b. At paragraph [84] of the decision, correctly identified that the question for her to consider is whether the appellant has adduced evidence capable of demonstrating that there are substantial grounds for believing that Article 3 would be violated if he were returned to Afghanistan. That was in my judgement a paragraph added simply so express the issue being considered by the judge.

c. At paragraph [109] of the decision, made a correction, so that it was clear what it was the judge meant to say regarding the Article 3 claim. It is in effect an amalgamation of what was said in paragraphs [108] and [109] of the decision promulgated on 1st February 2021.

d. Judge Head deleted the erroneous reference in paragraph [110] of the decision promulgated on 1st February 2021 to N v UK.

24. In my judgement, Judge Head was not having 'second thoughts' or introducing matters that had not previously featured in her decision-making but was simply amending and correcting the reasons set out, so that it was clear that she had not misconstrued or mis-appreciated the law. In my judgement it is clear that Judge Head was correcting her reasons in a manner permitted by Rule 31 by deleting the reference to N v UK, in circumstances where she was plainly aware of the subsequent decision of the Supreme Court in AM (Zimbabwe) and had plainly reached her decision by applying the test and guidance set out by the Supreme Court.

25. I find therefore that the decision of the First-tier Tribunal that is the subject of the appeal before me is the decision of First-tier Tribunal Judge Head promulgated on 3rd February 2021. The fact that the appellant's representatives had not received the decision promulgated on 3rd February 2021 would, if it had been necessary, have persuaded me that I should grant permission to the appellant to rely upon the additional ground, ground 5, that is set out in the appellant's written submissions.

The appeal before me

26. Returning then to the appeal, as I have set out, Mr Tufan concedes on behalf of the respondent that the decision of First-tier Tribunal Judge Head promulgated on 3rd February 2021 to dismiss the appeal on asylum grounds is vitiated by a material error of law. That decision is unaffected by anything that I have said above regarding the consideration of the Article 3 claim. In the circumstances I need not say anything further about the grounds of appeal.

27. The decision of First-tier Tribunal Judge Head to dismiss the appeal on asylum grounds is set aside. Both parties agree that I can remake the decision, and to that end, Mr Tufan confirms that on the particular facts of this case, and the current country information, the respondent accepts the appeal can be allowed on asylum grounds. In the

circumstances, Ms Revill did not seek to pursue the other grounds or the challenge to dismiss the appeal on humanitarian protection, and ECHR grounds.

NOTICE OF DECISION

28. The decision of First-tier Tribunal Judge Head promulgated on 3rd February 2021 to dismiss the appeal on asylum grounds is set aside.

29. I remake the decision and allow the appeal on asylum grounds.

Signed **V. Mandalia** Date 13th December 2021

Upper Tribunal Judge Mandalia

FEE AWARD

As no fee is paid or payable, there can be no fee award.