



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/00739/2019

THE IMMIGRATION ACTS

**At: Field House
On: 21st December 2021**

**Decision & Reasons Promulgated
On: 2nd February 2022**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

SS (Afghanistan)

Respondent

**For the Appellant: Mr Tan, Senior Home Office Presenting Officer
For the Respondent: Mr Eaton, Counsel instructed by Duncan Lewis &
Co**

DECISION AND REASONS

1. The Respondent is a national of Afghanistan born in 1992. On the 3rd April 2021 the First-tier Tribunal (Judge Shamash) allowed his appeal against the decision of the Secretary of State's decision to automatically deport him as a foreign criminal. The appeal was allowed on human rights grounds. The Secretary of State now has permission to appeal against that decision.
2. The matters in issue before the First-tier Tribunal was whether the Respondent could defeat the planned deportation action by reference to his human rights. He had been convicted on three counts of sexual

activity with a minor. The circumstances of that offence were that as a 24 year old man he groomed a 14 year old girl online before driving from London to her home in Scunthorpe to meet with her. He took her back to London with him and took her to a flat where he had sex with her on 5 occasions. He offered her cannabis and cocaine. He was sentenced to a total of 46 months imprisonment. Having had regard to these facts Judge Shamash found that the Respondent was excluded from the protection of the Refugee Convention because he had been convicted of a particularly serious crime. She was nevertheless satisfied that his deportation would place the United Kingdom in violation of its absolute obligations under Article 3 ECHR. That is because she found there to be a real risk of the following:

- that the Respondent would face serious harm from the Taliban in his home area (*Musa Qala in Helmand province- it was accepted by a previous Judge that he had been persecuted by the Taliban who had murdered his parents*)
 - he would end up destitute in Kabul where he has no family support
 - the cost of accommodation and basic living would outstrip his earning capacity as a labourer
 - he is not healthy and has significant mental health issues
 - the antipsychotic/ antidepressant medications he requires are not free in Kabul
 - without medication his conditions will deteriorate further
 - he would be at heightened risk from the Taliban in Kabul because he is Westernised (*he has been in the UK since at least 2008*)
3. Taken cumulatively, Judge Shamash was satisfied that those matters presented a real risk of the Respondent facing inhuman and degrading treatment. The appeal was therefore allowed.
4. The Secretary of State's grounds were drafted on the 13th April 2021. In very brief summary they allege that Judge Shamash erred in law in:
- i) Failing to make reasoned findings on whether the Respondent had an extended family or other network upon whom he could rely in Kabul;
 - ii) Failing to make a clear finding on whether the required medication would be available to the Respondent in Kabul - the finding that it is not free is not the same thing;
 - iii) In respect of the medical claim failing to make a clear finding that the Respondent would be exposed to a serious rapid and irreversible decline resulting in intense suffering and/or a significant decline in life expectancy.

Discussion and Findings

5. In respect of ground (i) Mr Tan accepted that Judge Shamash does, twice at her paragraph 99, state that the Appellant has “no family support” in Kabul. He questioned however where the reasoning supporting that finding could be found. He pointed out that the *Devaseelan* starting point had been the decision of a First-tier Tribunal Judge O’Flynn who in 2010 had rejected the Appellant’s evidence that he had lost contact with an uncle, who had last been seen by the Appellant in Musa Qala. Mr Tan submitted that the Tribunal appeared to just take the Appellant’s evidence about his lack of ties to Kabul at face value and proceed on the basis that he was telling the truth: what she should have done was consider whether that is in fact the case.
6. Whilst I would accept that Judge Shamash does not set out in detail why she makes the findings that she did, I am not satisfied that she can be said to have erred in approach. There was no great debate about the Appellant’s circumstances in Afghanistan. It was accepted that he is from Musa Qala, that he has never lived in Kabul, that his parents had been murdered by the Taliban. The uncle referenced by Judge O’Flynn in 2010 was back in Helmand province, or possibly Pakistan. If Judge Shamash had found the Appellant to have meaningful connections in Kabul on the basis of that, she would arguably have erred by indulging in impermissible speculation. There was no evidence at all, at any stage in the Appellant’s long immigration history, to suggest that he had links, familial or otherwise, with Kabul. The complaint that the Tribunal may somehow have erred in accepting the Appellant’s evidence on this point is also difficult to understand, given that so much of what this Appellant has had to say over the years has been accepted: that he was viciously beaten by the Taliban for refusing to join, that his parents were murdered because his father worked for the Karzai government, that the Appellant was a minor on arrival. This was not therefore a case where the Appellant’s credibility had been fatally undermined.
7. Nor does the issue of medication appear to have loomed large in the submissions before Judge Shamash. She addressed the issue by simply finding that “there is very limited provision for mental illness in Afghanistan. Medication is not free”. The Secretary of State now takes issue with that finding on the basis that it is unreasoned. There are three reasons why this submission is hopeless. The first is because Judge Shamash was there doing no more than echoing the country guidance: see AS (Kabul) at paragraphs 241 and 242. The second is that this was also her *Devaseelan* starting point, since Judge O’Flynn had found there to be no meaningful mental health treatment in Afghanistan, and had allowed the Appellant’s appeal on Article 3 grounds. Thirdly, and most significantly given the findings of Judge O’Flynn, the Secretary of State presented no evidence whatsoever to lead Judge Shamash to a conclusion other than the one she reached. In failing to acknowledge that this was a *Devaseelan* point the grounds are wholly misleading.

8. I need not address the third ground in detail because Mr Tan did not make any submissions on it. He was right to do so, because it is quite clear from the decision that Judge Shamash expressly directs herself to AM (Zimbabwe) and that is the test that she applies. For the avoidance of doubt, in deciding to allow the appeal on Article 3 grounds Judge Shamash was doing no more than following the *Devaseelan* findings of Judge O'Flynn, who had, in an unappealed decision, allowed the appeal on precisely these grounds in the past. It was in those circumstances for the Secretary of State to show some reason why those findings should not be followed, for instance by the introduction of some new evidence. In the absence of such evidence she cannot now complain.
9. Finally I should note that there has of course been a material change in circumstances since the Appellant won his appeal, and since the Secretary of State was granted permission to appeal. On the 15th August 2021 Kabul fell to the Taliban. The Secretary of State has amended her CPINs accordingly. It is that group - who murdered the Appellant's parents and beat him with a rifle butt when he was still a child - who now run the entire country. In light of that change in circumstances, and the policy expressed in the CPINs, Mr Tan acknowledged that he would have difficulty in demonstrating any error in Judge Shamash's decision, had one been established, to be in the end material.
10. The appeal is dismissed.

Anonymity

11. The Appellant is a vulnerable witness. As such I am satisfied, having had regard to the guidance in the *Presidential Guidance Note No 1 of 2013: Anonymity Orders*, that I must make an order in accordance with Rule 14 of the *Tribunal Procedure (Upper Tribunal) Rules 2008* in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him, any of his witnesses or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decisions

12. The decision of the First-tier Tribunal is upheld.
13. The appeal is dismissed.

14. There is an order for anonymity.

A handwritten signature in black ink, consisting of the letters 'CBE' in a cursive, flowing style.

Upper Tribunal Judge Bruce
21st December 2021