IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005681
First-tier Tribunal No: PA/55535/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

24th January 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA &
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

AS
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Sellwood, counsel instructed by Duncan Lewis
For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 16 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant in the appeal before us is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant is Palestinian, formerly resident in the El-Buss refugee camp in Lebanon. He was born in 1986 and is severely sight impaired. The Appellant arrived in the United Kingdom on 19 February 2014 and claimed asylum but that application was refused and he became appeal rights exhausted by the end of 2017. The Appellant made further submissions in April 2018, which were refused with no right of appeal and in May 2020, which were refused with the right of appeal on 1 November 2021. The basis of his claim is that he was accused of spying for Israel and feared persecution by Hezbollah. The Appellant was also diagnosed as suffering from a depressive disorder exacerbated by psychotic symptoms with suicidal intent.

2. The Appellant appealed against this decision and his appeal came before First tier Tribunal Judge Feeney [FtTJ] for hearing on 8 September 2022. He was treated as a vulnerable witness [6] but gave evidence and was briefly cross-examined. In a decision and reasons promulgated on 21 September 2022, the FtTJ dismissed the appeal on all grounds.

3. The Appellant sought permission to appeal to the Upper Tribunal, in time, on the basis of that the First tier Tribunal Judge materially erred in seven material respects:

    (i) in failing to apply the correct test for a suicide risk *viz J* [2005] EWCA Civ 629 and *Y* [2009] EWCA Civ 362;

    (ii) in her approach to the Appellant's cognitive impairments and memory and failed to give reasons for rejecting the expert evidence on the manner in which the Appellant's cognitive impairments affected his memory and impeded his ability to remember verbatim matters such as dates and failed to take account of relevant information regarding the psychological reports and consistency;

    (iii) in failing to take account of relevant information in her consideration of article 8 of ECHR and the very significant obstacles to integration test;

    (iv) in requiring the Appellant to account for the actions of a regime that oppressed him by asking him to explain something outside his knowledge and failed to extend the benefit of paragraph 339L of the Immigration Rules;

    (v) in failing to consider the Appellant's vulnerability to exploitation as per the report of Dr Wood;

    (vi) in her approach to the screening interview where the Appellant did not mention his fears;

(vii) in failing to consider article 1D of the 1951 UN Refugee Convention.

4. Permission to appeal was granted by UTJ Canavan on 12 December 2022. She said:

> *"2. This is a borderline decision because many of the judge's findings were likely to be open to them to make. The First-tier Tribunal had new evidence in the form of expert country and psychological reports. Although the judge considered those reports in the decision it is at least arguable that the judge might have failed to give adequate reasons to explain why this significant new evidence was not sufficient to depart from the previous findings of the First-tier Tribunal.*
>
> *3. Following the decision in AM (Zimbabwe) I accept that the case law relating to suicide risk is still likely to still be relevant to this distinct area of assessment under Article 3 given that one of the six steps outlined by the Court of Appeal in J and Y (Sri Lanka) included an assessment of whether the relevant threshold was met i.e. whether there is a real risk of suicide, which would by definition meet the N threshold. Whether the first ground of appeal might disclose material error of law, given the judge's factual findings relating to the psychological evidence, is a matter that will need to be considered further by the Upper Tribunal at the hearing.*
>
> *4. Whilst some of the other grounds are somewhat peripheral, I do not limit the grant of permission."*

5. The Respondent issued a rule 24 response to the grounds of appeal on 8 February 2023, in which he opposed the appeal on the basis that the FtTJ directed herself appropriately.

Hearing

6. At the hearing before the Upper Tribunal, Mr Sellwood sought to rely upon the seven grounds of appeal identified and his rule 25 reply dated 6 November 2023. The focus of his oral submissions was upon grounds 1, 3, and 7. In the course of his oral submissions he took us to the material documents within the Appellant's bundle prepared for the hearing before us. We mean no disrespect by not setting those submissions out in full, but summarise as follows.

7. With regard to Ground 1 and the treatment by the judge of the risk of suicide, Mr Sellwood took us to paragraphs within the very detailed report of Dr Rachel Thomas, in which she concluded that the Appellant would be unable to tolerate further traumatisation; that the suicide risk is real and present if the Appellant were to be removed and that he was too psychiatrically unwell to access treatment. Mr Sellwood submitted that [25] of the decision and reasons does not address all the key points and that at [27] the judge rejected the Appellant's subjective belief of risk without

engaging with Dr Thomas' opinion to the contrary and provided no reasons for rejecting that opinion. At [30] Mr Sellwood submitted that the judge failed to address Dr Thomas' conclusions as to the severity of the Appellant's needs on return and his inability to access treatment because he was too unwell and also failed to take full and proper account of the background material and the lack of treatment available to stateless Palestinian refugees: see eg. the UNWRA report at AB 126-127 dated 1.9.22 and the country expert report of Dr Anne Irfan at AB 138-159.

8. With regard to ground 2 and the judge's erroneous approach to the Appellant's cognitive impairments, Mr Sellwood submitted that it was clear from the previous determination in 2017 that there were pointers concerning the Appellant's cognitive impairments at that time with continuing diagnoses stretching back some years. The judge accepted this at [11] and [12] but stated that she would have preferred an assessment closer to the time of the relevant events and approached Dr Wood's report with an "*appropriate degree of caution*" but in so doing failed to take account of relevant evidence ie the fact that there were reports closer to the time of the relevant events by Dr Sellwood and the medical staff at the Immigration Removal Centre, which Dr Wood took into consideration in his own assessment at A170. The judge failed to note that the Appellant's performance was around the 0.1st percentile which indicated a serious intellectual disability, even taking account of inhibitors eg language and the fact he is severely sight impaired.

9. Mr Sellwood submitted that ground 3 overlaps with ground 1 in that Articles 3 and 8 were not properly considered by the judge and the judge failed to make findings. He submitted that risk arising from intentional harm and unintentional harm with sufficient deprivation could engage art 3 *cf.* Ainte (material deprivation – Art 3 – AM (Zimbabwe)) [2021] UKUT 00203 (IAC) and that the UNWRA report and expert report are very relevant in that assessment. All of that had to be considered as part of Article 3 assessment the judge failed to do so. Equally relevant in respect of the Article 8 consideration was whether or not the Appellant met the requirements of the Immigration Rules and whether there were very significant obstacles to his integration on return.

10. In light of Kamara [2016] EWCA Civ 813 at [55] the test is a broad evaluative judgment ie. whether the Appellant is enough of an insider to understand how life is carried on and capacity to participate in it. Whilst the judge addressed this at [31]-[35] Mr Sellwood submitted that the findings demonstrate a failure to apply paragraph 276ADE(vi) and the *Kamara* test. The judge focused on the fact the Appellant had spent his life in Lebanon with cognitive difficulties and had support from his parents. Mr Sellwood submits that in light of the judgment of the Supreme Court in Samambar [2021] UKSC 30 the focus is on return to the country rather than the

specific location, and that it was also possible the Appellant was not integrated into El Buss camp because of all his vulnerabilities. One point in respect of integration is the ability to find work and the Appellant's case is that he has never been employed due to his vulnerabilities and characteristics. Furthermore, there is also a list of occupations that Palestinians are not allowed to engage in. For a blind person with learning difficulties, life in the camp is very difficult physically and culturally. The Appellant would also suffer stigma due to his mental health. Mr Sellwood submits that the very significant obstacles assessment is very complicated; there is a lot to take into account and the judge failed to do so. Even if the Appellant were integrated in 2013, he has been away for 10 years, and his eyesight had got worse. His blindness is progressive, it is not curable. It will only get worse.

11. As far as ground 7 and Article 1D of the 1951 UN Refugee Convention is concerned, Mr Sellwood accepts, as the respondent states in his rule 24 response, that this had not been raised and was not addressed in the refusal decision albeit, it had been raised in the fresh claim representations made by the Appellant. Mr Sellwood submits it was a *Robinson* obvious point arising from obligations under an international treaty i.e. would it breach the UK's obligations under the Refugee Convention *cf.* AZ (Iran) [2018] UKUT 00245 (IAC) at [61] onwards. Given permission has been granted on all grounds, Mr Sellwood submits it is an issue that we must consider. He sought to rely upon the unreported case of *AKO* which crunches the jurisprudence and sets out four key questions when determining whether or not someone is a refugee. Is the person:(i) entitled to receive UNRWA protection? (ii) has he previously received it? (iii) did he cease to receive it because his personal safety was at risk? (iv) was he forced to leave UNRWA area of operations owing to circumstances beyond his control?

12. Mr Sellwood submits that if a person is already recognised as a refugee by UNRWA, unless the protection has ceased for any reason, EU law is also applicable because it was retained under the EEA Regulations which were only revoked in 2022 under NABA, and there are savings provisions which mean that if you made your claim before that date, the Regulations apply and the Immigration Rules require any decision making to be in accordance with the Refugee Convention, albeit there is a different threshold and set of tests to an Article 1A Refugee Convention claim. Mr Sellwood submits that there was an arguable claim under Article 1D which could have made a difference to the outcome of the appeal in light of a judgment of the CJEU which analysed how Article 1D applied in practice, to a family with a severely disabled child in the same refugee camp the Appellant is from.

13. In his submissions, Mr Parvar relied upon the rule 24 response. He submitted that in his oral submissions before us Mr Sellwood seeks

to go far beyond the ground as pleaded. Ground 1 as pleaded focuses entirely upon the test that applies when the Tribunal is considering the risk of suicide. Mr Parvar accepts the judge does not refer to the relevant authorities ie *J* and *Y,* but he submits, the judge was not required to do so and in reaching her decision, the Judge had in mind the report of Dr Thomas. The Judge said, at [27], that she did not accept that the Appellant subjectively believes that he is at risk should he return to Lebanon. The Judge noted the Appellant had been assessed by Dr Thomas as having capacity to instruct a solicitors and to give evidence, albeit with recommendations. The Judge said that she had not seen anything to suggest the Appellant is not capable of distinguishing reality and truth from imagination and fiction. The Judge therefore rejected what is said by Dr Thomas in her report at [111] that the Appellant believes the risks are real. The Judge is the fact finder and she rejected the core of the Appellant's claim. Mr Parvar submitted that the Judge has directed herself appropriately despite failing to refer to test in *J*.

14. With regard to ground 2 and cognitive impairments, Mr Parvar submits that this is a second appeal and the findings of Judge Herlihy are the starting point. If the Judge is to depart from the previous decision of the FtT, there needs to be good reason. The Judge was entitled to view the new evidence with circumspection by reference to the timings of the reports and the judge reached findings that were open to her. Judge Herlihy had previously considered the expert evidence available and it was not for Dr Wood to substantiate the Appellant's own claim for international protection. The judge made an explicit finding that she was not satisfied that the Appellant's cognitive difficulties account for discrepancies in the Appellant's account. The judge carefully set out and considered the conclusions set out in the report of Dr Wood, and addressed the difference between 'verbatim memory and gist memory'. Having carefully considered the evidence, it was open to the judge to conclude that she should not depart from the findings previously made.

15. With regard to ground 3, there are unchallenged points at [33]. The Appellant was born and brought up in Lebanon and the judge appreciated the point that the Appellant may not be integrated. There was no skeleton argument uploaded on the platform and no indication that it was handed in, and no record of proceedings. Consequently, it is not safe to assume that what is pleaded in ground 3, or the article 1D point were before the judge. In response to questions from us, Mr Parvar stated that paragraph 276ADE(vi) of the Rules had been considered in the refusal decision but that the arguments as now framed, had not been put in that way: see [33]. Mr Parvar submitted that there was also the also the possibility of remittances from the UK. This was not a case where the Appellant or his family produced their own research into, for example,

employment, so even with difficulties in the economic situation these matters could conceivably be argued in circumstances across the world. He submitted that what is there in the determination, is enough.

16. With regard to Ground 4, Mr Parvar submits the Appellant was not required to name things relating to an oppressive regime. His own evidence is speculative, and it was open to the judge not to accept this particular assertion. Even with levels of corruption in Lebanon, ultimately it is speculation and that is as far as the judge went. It does not detract from the adverse points set out in the previous decision of Judge Herlihy.

17. With regard to Ground 5, Mr Parvar submits it is difficult to see what further consideration was expected on this matter. Dr Wood was instructed to comment upon whether the Appellant was vulnerable to exploitation. At [50] he simply refers to behavioural challenges and emotional dysregulation and his opinion is very limited on this particular matter. It was also highly possible this matter was not taken any further by his representative at the FtT hearing. The opinion from Dr Wood was sufficient to alleviate any hypothetical concern regarding exploitation, given the very limited evidence on that issue.

18. With regard to Ground 6, Mr Parvar submits the Appellant's cognitive difficulties and suggestibility does not have anything to do with the core of the Appellant's own claim for international protection. It logically followed that the basis of claim would be stated in the screening interview and the Judge was correct to adopt the position taken by the previous judge. At [19] of the judge's decision, the judge considered the explanation provided by the Appellant and did not find it credible that an agent would offer the advice claimed, and that the Appellant had given his disability as the reason because that is the truth. The Judge considered the Appellant's account and rejected it. She was entitled to do so.

19. With regard to Ground 7, Mr Parvar frankly acknowledged that he is in difficulty as there is no record of proceedings. He submits the issue had not been considered by the SSHD and so it was a new matter and is quite different from normal *Robinson* obvious errors. The matter now relied upon by the Appellant had not been pleaded and argued, and the Judge cannot be crticised for failing to address and issue that was not raised before the FtT. It was entirely possible the appellant's representative may have decided not to pursue the issue on the day of the hearing.

20. Mr Sellwood replied in full to Mr Parvar and we have a note of his detailed and helpful submissions, however, for the reasons set out below we find no need to set them out in full in this decision.

21. We reserved our decision which we now give with our reasons.

Decision and reasons

22. We remind ourselves of the restraint which an appellate body must exercise when considering an appeal against the decision of a specialist judge at first instance. In *UT (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1095 the Court of Appeal reminded appellate courts:
"It is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in AH (Sudan) v Secretary of State for the Home Department at [30]:

> "*Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.*""

23. We are satisfied that the decision of the First tier Tribunal Judge is infected by material errors of law, principally for the reasons set out in grounds 1 and 3, such that the decision must be set aside.

24. As far as Ground 1 of the grounds of appeal is concerned, we accept that whilst the judge considered whether there was a real risk of suicide at [28]-[30] she failed to assess this risk with regard to the relevant jurisprudence *cf. J* [2005] EWCA Civ 629 and *Y* [2009] EWCA Civ 362, which casts serious doubt on her conclusions on this key issue in the appeal. We further accept Mr Sellwood's submission that the judge should have gone on to consider whether article 3 would be engaged in the event of a failed suicide attempt, given that the other side of any suicide claim has to be serious and irreversible decline in health in the event that suicide is unsuccessful.

25. With regard to Ground 3, we find that the judge materially erred in law at [32]-[35] in her assessment of whether there would be very significant obstacles to the Appellant's integration in Lebanon, both in failing to consider and apply the judgment in *Kamara* and in failing to take account all the material considerations, including the Appellant's ability to find employment. We further find that consideration should have been given to the proportionality of the decision given the potential impact on the Appellant's physical and moral integrity and his residence, albeit without leave, in the United Kingdom for in excess of 9 years during which time he would have developed a private life.

26. In relation to Ground 2 and whether the judge erred in her approach to the Appellant's cognitive impairments, we note that the judge

treated the Appellant as a vulnerable witness [6] and she reminded the parties of the recommendations for the hearing as set out by Dr Thomas in her report. She also set out in some detail the conclusions of the expert reports, concluding at [18] and [19] that she was not satisfied that the Appellant's cognitive difficulties account for the discrepancies in the claim. Despite Mr Sellwood's able submissions we do not find an error of law in the judge's approach to this aspect of the appeal given she accepted that the Appellant has cognitive difficulties as well as physical and mental health problems and that she was bound by the findings of the previous judge in light of *Devaseelan.*

27. With regard to Grounds 4-6 of the grounds of challenge, we find that these do not disclose any material errors of law but are rather a disagreement with the judge's findings of fact which were open to her on the evidence, particularly given that this was a second appeal so that *Devaseelan* and the findings of Judge Herlihy applied.

28. With regard to Ground 7 of the grounds of challenge, we note that Article 1D was not argued before the First tier Tribunal Judge and so a failure to engage with it cannot properly constitute an error of law. Appeals such as this are determined on the basis that the Tribunal decides the factual and legal issues which the parties bring before the Tribunal. The Tribunal decides the issues which are raised and normally will not decide issues which are not raised. A party cannot, in our judgment, ordinarily seek to appeal the judge's decision on the basis that a claim, which could have been brought before the judge, but was not, would have succeeded if it had been so brought. The parties are entitled, and the Tribunal requires, to know what the issues are.

29. Whilst we have not found material errors in the entirety of the decision and reasons of the First tier Tribunal Judge, we consider that there are sufficient material errors that require judicial fact finding in order to reach a fair determination such that the appeal should be remitted back to the First tier Tribunal for a hearing *de novo*.

30. Further, although we did not find an error in respect of the fact that article 1D has not been considered to date, we entirely accept that it is a relevant consideration which was not raised by the SSHD in the refusal letter but now, having been raised, should be determined. Therefore, prior to the remitted hearing we invite the Appellant's representative to set out his case with regard to article 1D in writing and for the SSHD to then set out his response to this, so that all material matters will be before the judge at the hearing before the First tier Tribunal.

Notice of Decision

31. We find material errors of law in the decision and reasons of the First tier Tribunal Judge. We set that decision aside and remit the appeal for a hearing *de novo*.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

23 January 2024