Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11929/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 March 2019	**On 25 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

[A N]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Ryan for Duncan Lewis & Co
For the Respondent: Mr T Lindsey, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought against the decision of Judge of the First-tier Tribunal Welsh who in a Decision and Reasons promulgated on 8 January 2019 dismissed the claim of the Appellant, a national of Afghanistan whose date of birth is recorded as 1 January 1978 against the refusal by the Secretary of State to recognise him as a person in need of international protection. This appeal comes before me with the permission

of Judge of the First-tier Tribunal Murray. She has helpfully summarised the grounds in the grant of permission. That grant reads as follows:

> *"1 […]*
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> *2. The grounds assert that the Judge erred in placing little weight on the expert report of Dr Buttan relying too heavily on credibility issues and the lack of corroborative evidence. It is submitted that the opinion of an experienced psychiatrist that he was not feigning symptoms has not been afforded appropriate weight and is insufficiently reasoned. It is further submitted that the Judge erred in failing to take the particular circumstances of the Appellant into account in relation to internal flight and failed to address the Appellant's argument that the case of* ***AK (Article 15(c)) Afghanistan CG [2012] UKUT 163*** *is no longer good law and to have regard to the argument that the "sliding scale" approach in relation to Article 15(c) applied in relation to the Appellant's vulnerabilities.*
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> *3. It is arguable that the Judge failed to give appropriate weight to Dr Buttan's report as independent evidence. It is less arguable that the findings, in the alternative, that the Appellant could relocate are flawed for the reasons argued in the grounds. The Judge clearly addressed the Appellant's arguments and evidence in relation to departing from* ***AK*** *at paragraph 47 but arguably did not address the "sliding scale" argument".*

2. This appeal has something of a history. On 23 December 2014 Judge of the First-tier Tribunal S J Clark heard the Appellant's appeal in respect of an earlier refusal by the Secretary of State to recognise him, the Appellant as a refugee. At paragraph 2 of his Decision and Reasons Judge of the First-tier Tribunal Welsh has commendably briefly summarised the Appellant's claim. He fears persecution by members of the Ahmad Shah Masood Party and the Taliban. It was his case that his uncle was an active member of the Party but then left and joined the Taliban. Members of the Party believed that the Appellant's uncle had stolen weapons from them. The consequence was that the Appellant was threatened. His brother was murdered. It was also the Appellant's case in the appeal brought before Judge Welsh that the current situation in Afghanistan was such that his return would breach Article 15(c) of the Qualification Directive.

3. This is a case in respect of which the guidance in the case of **Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* [2002] UKIAT 00702** applies so that the starting point for Judge Welsh was the findings made by Judge Clark in the earlier appeal heard at Taylor House on 23 December 2014. Judge Clark dismissed the appeal on all grounds. There was an application for permission to appeal to the Upper Tribunal but that was refused. This matter came again before the Tribunal after a fresh claim was made on behalf of the Appellant to the Secretary of State which was originally rejected but subsequently accepted as such following Judicial Review proceedings.

4. Looking at paragraph 19 of the decision of Judge Clark it is clear that he did not accept any material aspects of the Appellant's claim, describing the account provided by the Appellant as being "full of inconsistencies" the reason for those inconsistencies were found by Judge Clark to be because the account "was not true".

5. In those circumstances although as I have said the starting point for Judge Welsh was the findings of Judge Clark, apart from nationality which was not in dispute there was very little for Judge Welsh to build upon.

6. The guidance in the case of **Devaseelan** reads as follows:

> *"In our view the second Adjudicator should treat such matters in the following way:*
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> 1. *The first Adjudicator's determination should always be the starting point. It is the authoritative assessment of the Appellant's status at the time it was made. In principal issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.*
> 2. *Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator. If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the Appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.*
> 3. *Facts happening before the first Adjudicator's determination and having no relevance to the issues before him can always be taken into account by the second Adjudicator. The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them."*

7. Miss Ryan prepared a helpful skeleton argument. The first submission was that the Upper Tribunal should treat the grant of permission as a grant on all grounds. No point was taken on this in the Rule 24 Notice by the Secretary of State and accordingly given the guidance in the case of **Ferrer (Limited appeal grounds; Alvi) [2012] UKUT 00304**, I have addressed this appeal on the basis that all grounds are before me. The grounds focus on the expert evidence of Dr Buttan and the fact that little weight was given to it; that the issue of internal relocation had not properly been addressed, though the issue of internal relocation does not arise if the Appellant is not in the first instance found to be a refugee. Further as I have already mentioned issue was taken of the Judge's approach to humanitarian protection and the sliding scale having regard to the guidance in the case of **Elgafaji (Justice and Home Affairs) [2009] EUECJ C-465/07 (17 February 2009)**.

8. I have looked with care at the skeleton argument provided by Miss Ryan. Judge Welsh quite properly began by consideration of the decision of First-tier Tribunal Judge Clark. Judge Welsh noted the basis upon which the Appellant was found not credible. He noted that the Appellant had given evidence before him that gave a broadly consistent account to that given to Judge Clark and noted further that the reality was that only additional material provided by the Appellant in support of the fresh claim was medical evidence.

9. Emphasis is placed upon the report of Dr Buttan. Judge Welsh looked at the report of Dr Buttan and considered it from paragraph 21 through to paragraph 25 of the Decision and Reasons.

10. Judge Welsh found the Appellant's case to lack credibility and said so at paragraph 37. He also made clear at paragraph 38 that he had looked at the evidence as a whole "*to allow for the possibility that it casts a different light upon the evidence that was given for Judge Clark*".

11. Judge Welsh acknowledged that the evidence of Dr Buttan provided additional support to the Appellant's credibility but gave little weight to it and gave as his reasons the following:

> "1. The assessment relies upon the account given by the Appellant and, for all the reasons set out in this judgment, I take the view he is not a credible witness.
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> 2. There is no independent corroboration of symptoms. Miss J, who was not called to give evidence, stated no more than, "He suffers with bouts of depression which can make it very difficult to function well". That he meets a psychiatric on a voluntary basis, takes medication in addition. The Appellant has lived with Miss J since 2009. She described him as a friend and has in the past been more than that; they were previously in a romantic relationship in 2010 to 2013. If anybody could give a detailed description of the Appellant's symptoms from 2009 to the present day, it is Miss J and yet she does not do so.
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> 3. I also question how reliable what little evidence Miss J gives these. In the same letter, she stated the Appellant, "has very few friends and does not social much away from the house because of the injury he has to his left leg". This contradicts the Appellant's own account which statement 1, in which he stated that he has lots of friends in the UK with whom he regularly socialises.
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> 4. As Ms Ayodele pointed out to me in her submissions, his first reports of depression and insomnia (April and May 2015) occur shortly after he has been refused permission to appeal the dismissal of his asylum appeal and also the ending of contact with his wife and children. Both these events could be genuine sources of mental health difficulties.
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> 5. Those first reports of depression and insomnia in mid-2015 do not correlate with his claim to have suffered those symptoms since 2005-2006 (as he claimed to Buttan). I note that the oral evidence, he stated that his father-in-law had prevented him contacting the family because of the Appellant's mental health problem, which would date

those mental health difficulties occurring in 2015. However, I do not accept that account:

(i) when asked, he was unable to give an explanation why his father-in-law would know he was suffering from mental health problems; and

(ii) this account is inconsistent with what he told a therapist on 10 January 2018 (when he had the assistance of an interpreter). His therapist recorded that the Appellant explained his father-in-law had stopped his wife from contacting him "because [his father-in-law] says [the Appellant] has lived here for too long".

12. I have read the report of Dr Buttan and looked carefully at the skeleton argument of Ms Ryan. I am also grateful to her for the submissions which she made to me but I find, and indeed have no difficulty finding, that the findings made by Judge Welsh were findings that were open to him.

13. This is not a case in which insufficient weight was given to the report of Dr Buttan but in my view is a case in which the Appellant disagrees with the findings that were open to the Judge. Judge Welsh in my judgment carefully considered the evidence of Dr Buttan. He recognised that the medical evidence provided additional support to the Appellant's credibility. This is not a case in which the judge has fallen short of the guidance given in **Mibanga v SSHD [2005] EWCA Civ 367.** Judge Welsh made findings and then tested those findings against the medical evidence. However, and importantly, it is clear that Judge Welsh considered all the evidence in the round and said so. It is to be remember that a judge has to start somewhere in their deliberations.

14. Having found that the Appellant had not established his case, Judge Welsh was right to find, as he did at paragraph 42 that the issue of internal relocation did not arise. However, in the following paragraphs Judge Welsh gives cogent additional reasons for not finding the Appellant, overall to be a reliable witness.

15. Having regard to Article 15(c), the credibility finding made against the Appellant's appeal on this point gets nowhere. It was not accepted that the Appellant did not have family and support in Kabul. That necessarily follows because it was for the Appellant to prove his case, albeit to the lower standard, but having been found to be a witness so lacking in credibility as he was, it would have verged on perverse to have found that the Appellant's evidence on this point was to be accepted. As it is there is reference to the Appellant having a cousin in Kabul and an uncle, whom Judge Welsh clearly did not accept, as was open to him, had disappeared as the Appellant had claimed.

16. As to the submission made that Judge Welsh should have accepted more up-to-date background material, the Judge dealt with that in a way which was again open to him, explaining why took the view he did and again, in

my judgment the Judge was entitled to take that view. This finding should not take the Appellant by surprise given the terms in which permission to appeal were given.

17. Where a Judge makes findings of fact which were open to him then no appeal lies, it is only if those findings are not supported by the evidence or perverse or irrational that the Upper Tribunal can interfere with them. In this case the appeal the Appellant has not made out his case on any of the grounds and accordingly the appeal to the Upper Tribunal is dismissed.

Notice of Decision

The appeal to the Upper Tribunal is dismissed on all grounds.

No anonymity direction is made.

Signed **Date: 17 April 2019**

Deputy Upper Tribunal Judge Zucker