Neutral Citation Number: [2018] EWCA Civ 2495

Case No: C4/2015/3790

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
MR JUSTICE WILLIAM DAVIS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2018

Before :

THE CHANCELLOR OF THE HIGH COURT
SIR GEOFFREY VOS
LORD JUSTICE LEGGATT
and
LORD JUSTICE HADDON-CAVE

- -

Between :

THE QUEEN ON THE APPLICATION OF PA (IRAN)	**Appellant**
- and -	
UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)	**Respondent**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

- -
- -

Ms Amanda Weston QC (instructed by **Southwark Law Centre**) for the **Appellant**
Ms Claire van Overdijk (instructed by **Government Legal Department**) for the **Interested Party**

Hearing date : Wednesday 24th October 2018

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Approved Judgment

LORD JUSTICE HADDON-CAVE :

Introduction

1. The Appellant appeals against the order of William Davis J dated 3rd November 2015 refusing permission to apply for judicial review in respect of the decision of an Upper Tribunal Judge ("UTJ") dated 25th August 2015, refusing the Appellant permission to appeal against the decision of First-Tier Tribunal Judge ("FTTJ") Youngerwood dated 18th May 2015 dismissing the Appellant's asylum and human rights claim, permission to appeal from that decision having first been refused by FTTJ Saffer on 2nd July 2015. Permission to appeal against William Davis J's order was granted by Gloster LJ on 4th July 2017.

The Background Facts

2. The Appellant is an Iranian national of Kurdish ethnicity who entered the UK on 4th August 2008, aged 17 years old. He was accepted as an unaccompanied minor and looked after by social services. He claimed asylum on the basis of fear of persecution as a result of his smuggling activities. His claim was first refused by the Secretary of State for the Home Department ("SSHD") on 20th January 2009.

3. The Appellant's first appeal against the refusal of his asylum claim was heard by Asylum and Immigration Tribunal Judge ("AITJ") JFW Phillips on 12th March 2009. The Appellant gave evidence that he lived in a village in Iran and between 2003 and 2008 engaged in illegal smuggling across the Iran-Iraq border. He said that he had evaded detention by the Iranian authorities on two occasions. On 18th March 2009, AITJ Phillips published his decision dismissing the Applicant's asylum claim on the grounds, *inter alia*, that the Appellant had given "*a thoroughly implausible and contradictory account and I do not believe that he is telling the truth about any of the core facts*" (paragraph [23] of AITJ JFW Phillips' determination).

4. On 1st March 2011, the Appellant lodged further submissions and evidence, including a country expert report from Dr Mohammad Kakhki. On 30th March 2012, the Appellant's further submissions were refused by the SSHD on the basis of the earlier adverse credibility findings by the AITJ. The Appellant then lodged further expert evidence in the form of psychological and psychiatric reports (see further below).

5. On 24th February 2014, the SSHD refused the fresh asylum claim, but with a right of appeal. On 10th March 2014, the Appellant lodged an appeal against the SSHD's refusal of the asylum and human rights claims. On 20th April 2015, the Appellant's legal representatives wrote to the FTT requesting that the Appellant be treated as a vulnerable adult on account of his cognitive impairment and low IQ. On 22nd April 2015, the SSHD issued further decision letters refusing the Appellant's further claims.

6. On 5th May 2015, FTTJ Youngerwood heard the Appellant's appeal. On 8th June 2015, FTTJ Youngerwood published his decision and reasons dismissing the appeal. On 22nd June 2015, the Appellant lodged an application for permission to appeal to the FTT. On 2nd July 2015 and 25th August 2015, permission to appeal was refused by the FTT and UTJ respectively as aforesaid. The Appellant then commenced judicial review proceedings. On 3rd November 2015, permission to bring judicial review proceedings was refused by William Davis J. The matter was then adjourned by order of Rafferty

LJ pending the outcome of *SA (Iran) (C5/2015/1148)* which was said to raise similar issues. However, *SA (Iran)* was subsequently settled. On 4th July 2017, permission to appeal was granted by Gloster LJ on paper.

'Cart' JRs of the UT

7. The relevant procedural rules governing these proceedings are CPR 54.7A and 52.8, which come into force following the Supreme Court's decision in *R. (Cart) v Upper Tribunal* [2011] 1 AC 663. The test for permission to bring judicial proceedings in the current circumstances under CPR 54.7A is a high one:

> *"(7) The court will give permission to proceed only if it considers—*
>
> *(a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and*
>
> *(b) that either—*
>
> *(i) the claim raises an important point of principle or practice; or*
>
> *(ii) there is some other compelling reason to hear it. …"*

Decision of William Davis J

8. William Davis J gave the following reasons for refusing permission for judicial review:

> *"Reasons:*
>
> *1. Although the application was lodged out of time, the delay was only a matter of days and a full explanation has been given. I extend time.*
>
> *2. The first ground of appeal relates to the FTT's application of the Devaseelan guidelines. In particular, it is said that the FTTJ (whose view was supported by the Upper Tribunal in refusing permission) applied the wrong test because the new evidence in relation to credibility ought to have been considered under guideline 5. This is not sustainable. Guideline 4 was the relevant part of Devaseelan given that the judge was considering credibility. The judge properly applied the guidance in LD (Algeria) as he said he did in the course of his decision.*
>
> *3. The second ground of appeal criticises the judge's use of the material relating to the Claimant's ability to instruct lawyers. The judge was entitled to take this into account as part of his overall assessment of the Claimant's general capacity, this being relevant to the issue of credibility and the findings at an earlier appeal hearing. The Claimant's submissions that the judge misdirected himself as to the law in reality are an attack on the judge's findings of fact. There*

was no arguable error of law in the judge's approach in reaching those findings.

4. *The judge is said to have erred in law in failing to conclude that the medical evidence adduced before him provided a very good reason for departing from the earlier credibility findings. The judge reviewed all of the evidence as to the Claimant's mental capacity at some length. He set out in detail his reasons for declining to accept the conclusions of the experts whose evidence was adduced by the Claimant. Those reasons were not perverse. He was entitled to reach the view that he did. He was not bound to accept the Claimant's expert evidence.*

5. *The grounds relating to the Kurdish ethnicity of the Claimant and the Claimant's Article 3 and Article 8 claims are not arguable for the reasons given by the FTT in refusing permission as confirmed by the Upper Tribunal. The Claimant argues that guidance is required in relation to the risk faced by a returning Kurd who is a failed asylum seeker. That is not the view taken by the Upper Tribunal i.e. the tribunal best placed to judge the need for general guidance in particular cases."*

Grounds of appeal

9. The Appellant's six grounds of appeal against the decision of the FTTJ (settled by previous Counsel) were as follows:

(1) The FTTJ misdirected himself incorrectly to the *Devaseelan* Guidelines applicable to this category of case and failed to have regard to the overriding principle preserving independent assessment;

(2) The FTT misdirected itself in law to the distinction between the mental abilities to satisfy the test for litigation capacity and the impact of mental impairments on the giving of evidence (without a litigation friend or intermediary); and/or adopted a procedurally unfair approach;

(3) The FTT erred in its treatment of the medical evidence and/or failed to give legally sustainable reasons for rejecting the severity of PA's cognitive malfunctioning;

(4) The FTT erred in law by failing to determine PA's refugee claim against the expert country evidence that Kurdish ethnicity and background was central to risk; and/or by failing to lawfully determine his claim;

(5) The FTTJ erred in the Article 3 assessment based on the risk of suicide;

(6) The FTTJ misdirected itself and/or failed to take into account material considerations in relation to PA's claim under Article 8 inside the Immigration Rules under paragraph 276ADE and outside.

10. Ms Amanda Weston QC who appeared for the Appellant (and who did not appear below) abandoned Grounds (1) and (5) and narrowed some of the issues in relation to the Appellant's remaining Grounds.

Analysis

Grounds (2) and (3)

11. Ms Weston QC took Grounds (2) and (3) together. She made a number of criticisms of the FTTJ's approach to the evidence principally directed at the FTTJ's treatment of the medical evidence. Her essential argument can be summarised briefly as follows: the FTTJ fell into material error in that he misunderstood and/or mischaracterised the Appellant's expert medical evidence and this led him to adopt an erroneous and unfair approach to the Appellant's case which both (a) reduced the relevance of the Appellant's psychological and psychiatric evidence and (b) undermined the Appellant's credibility.

The medical evidence

12. The FTTJ had extensive expert psychological and psychiatric evidence before him. This was in the form of three detailed reports from a clinical psychologist, Dr Craig McNulty (dated 12th March 2013, 15th July 2013 and 16th April 2015) and a detailed report from a consultant psychiatrist, Dr Hamideh Heydari (dated 17th October 2013). Both experts had examined the Appellant in person.

13. Dr McNulty, a specialist clinician in learning disabilities, examined the Appellant on three separate occasions over some two years for a total of some five hours. Dr McNulty described the Appellant as having a "*mild intellectual disability*" with verbal skills in advance of his overall IQ. Dr McNulty observed that "*the practical implications of this are that [the Appellant] is likely to be prone to make more errors and omissions of fine detail in his recall of factual information*". He said that the Appellant was able to give evidence in support of his case if appropriate allowances for a vulnerable person with cognitive limitation were made. He did not think the Appellant was suffering from PTSD, albeit he suffered from intrusive recollections. Dr McNulty found no general change in the Appellant's presentation over the two years but noted he was having greater difficulties with his attention and concentration.

14. Dr Heydari gave a concurring diagnosis. Dr Heydari described the Appellant as having "*mild cognitive impairment*" and being prone to "*exaggeration or the tendency to contradict himself*". Dr Heydari said:

> *"[F]requently I was left with the impression that [the Appellant] tried hard to understand and to appear to understand the more complex questions put to him, but his responses showed that he had not understood the question properly."*
>
> *"From time to time his speech would be a little incoherent and somewhat idiosyncratic… I was left with the impression that this is likely to perpetuated by a difficulty in his mentalizing and cognitive capacities… I also noted an element of perseveration where he would return to the same set of ideas and responses, and displayed poverty of thinking."*

15. Dr Heydari concluded:

> *"[The Appellant's] cognitive functioning appears clinically mildly impaired… references in the file frequently describe him as 'unsophisticated' and 'suggestible'. These terms can be euphemisms for describing people with mild learning disabilities particularly in cultures where [the Appellant] comes from. Mild mental impairment which can be without a clear aetiology would make the person vulnerable in managing more complex human interactions such as understanding intentionality both in themselves and others… I found him somewhat suggestible under pressure and he appears to try and guess the answer that he thinks is required of him… These gaps in understanding of the other person, or indeed possible remote memory gaps make him prone to exaggeration or the tendency to contradict himself."*
>
> *"[The Appellant's] insight into his difficulties is limited by his limited cognitive and mentalizing capacities. Although he is able to explain his life story as a broadly personal narrative, the depth and detail of his personal narrative is impoverished. This can at times make him appear inauthentic when, internally, he may be struggling with making sense of people's intentions and their requirements of him."*

The GP's evidence

16. The FTTJ also had evidence in the form of a short e-mail from the Appellant's GP, Dr Judith Eling, dated 29th September 2013 which read as follows:

> *"The appointment lasted 36 minutes, I was able to check this from our appointment system.*
>
> *I did not administer a test of cognitive functioning. Having seen the psychologist's report, I did try to get an impression of cognitive functioning by taking a thorough history and he seemed to have no problems with recall, he did not hesitate and had no difficulties with comprehension or with expressing himself. I had planned to review [the Appellant] a week later in order to gain a better impression of his mental state however. I would not always wish to make a diagnosis of PTSD or depression after the first consultation, and this was one reason for asking him to return. As you will have seen from the notes, he had presented with some symptoms suggestive of mental health problems and I was hoping to evaluate these further. Unfortunately he did not attend for his screening tests with our refugee nurse nor did he come back to see me. I am sorry if I have not been of much help. If you are in contact with [the Appellant] and he has ongoing health problems could you please encourage him to come back to see us."*

17. Dr Heydari commented on Dr Eling's e-mail as follows:

> *"I have considered [the Appellant]'s GP records provided by the Pavillion Medical Centre on 20 August 203 and an email from Dr Judith Eling to Kay Foxall dated 29 September 2012. I understand the consultation with Dr Eling took place on the 13th March 2013, and lasted for 36 minutes, and it was a one off interview. The patient had not met the doctor before. The comments regarding the client's mental state presentation i.e. "Does not appear depressed", relate to his presentation six months previous to my examination of him, and reflect the clinician's impression at the time. It is possible that he was not presenting with clinical depression at the time, and that his mental state has deteriorated further in the last six months. As regards the impression of Learning Disability: Mild learning disability is difficult to diagnose, and requires an extended assessment of the patient in different settings, and with corroborative histories from other sources. I have referred to this in my report. In my opinion it is possible that the GP may have been looking for gross signs of learning disability, which the patient did not exhibit. More subtle learning disability or any impaired mental functioning requires an in-depth, repeated and multi-disciplinary assessment of the patient."* (emphasis added)

18. In the latter passage, therefore, Dr Heydari emphasised the "*subtle*" effects which the Appellant's deficits might have on his functioning and highlighted the fact that mild learning difficulties may be hard to diagnose, even for professionals.

19. A similar point was made in The Joint Presidential Guidance Note No. 2 of 2010 ("*Child, vulnerable adult and sensitive appellant guidance*") which was also before the FTTJ (at paragraph 21):

> *"It may only become apparent that an individual is vulnerable at the commencement of or during the substantive hearing. Many difficulties are 'hidden' and become apparent during questioning…"*

FTTJ's judgment

20. The FTTJ's judgment runs to 51 pages. It rehearses all the documentary and witness evidence in extensive detail, including the medical evidence (pages 3-37). The findings occupy the remainder of the judgment (pages 37-51).

21. The FTTJ summarised the issues in the case as follows (page 3):

> "*7. As stated in the skeleton argument, those issues are:-*
>
> *(a) whether the appellant has a well-founded fear of persecution in Iran (or, my comment – a well-founded fear of serious ill-treatment) as a result of political/imputed political opinion, as a smuggler involved in illegal activity;*

> *(b) whether the appellant was at risk as a result of race/ethnicity as a Kurd and/or who has contravened Iranian law; or*
>
> *(c) evasion of military service; or*
>
> *(d) illegal exit from Iran and/or with an enhanced risk of questioning on arrival on account of his previous illegal activities."*

22. To this, the FTTJ added the following comment in parenthesis:

> *"(My comment – the issues of risk, based on him being a smuggler or involved in illegal activity in Iran, is subject to the issue as to whether I should depart from the adverse credibility findings made by an Immigration Judge in the earlier determination of the appellant's asylum appeal).*"

FTTJ's treatment of the medical evidence

23. The FTTJ began his analysis of the medical evidence (on page 43) by acknowledging that the question before him was whether the medical evidence before him demonstrated that the finding of the AITJ as to the Appellant's credibility was unsafe, *i.e.* "*whether… the implausibility and inconsistencies in the Appellant's account were due to his cognitive difficulties and low IQ*" (paragraph 35).

24. The FTTJ said this about Dr McNulty and Dr Heydari's evidence:

> *"37. … The experts' evidence certainly suggests very severe malfunctioning – his reasoning being compared to a 7 or 8 year old child – and someone who is easily confused and subject to memory loss, as well as suffering from a degree of depression."*
>
> *"45. It follows from my above analysis that we have apparently cogent and consistent expert evidence, as to the severe cognitive malfunctioning of this appellant, which it is difficult to reconcile with is sophisticated appeal statement, notwithstanding the explanation given, and almost impossible to reconcile with the evidence of Dr Eling."* (Emphasis added)

25. The FTTJ found against the Appellant on the following basis:

> *"46. … I am not persuaded that the appellant has the degree of cognitive impairment asserted by the experts, relied on by him, in this case.*
>
> *47. In light of my above findings, I take the view that there is no sufficient evidence before me to justify my setting aside, in terms, the original adverse credibility findings against this appellant. The evidence put before me is not sufficiently "new and compelling" and I consider myself*

> *not merely entitled to consider the original asylum findings but to treat it as determinative as to the appellant's core credibility."*

Misunderstanding of medical evidence

26. The key question for the FTTJ to determine was whether the medical evidence demonstrated that the finding of the AITJ as to the Appellant's credibility was unsafe. He was, of course, not bound to accept the evidence of the Appellant's experts or give their views full weight. He was, however, bound to consider the medical evidence before him carefully and base his findings on a proper reading of the experts' reports.

27. In my view, the FTTJ unfortunately misread, misunderstood or mischaracterised the Appellant's psychological and psychiatric evidence in a fundamental respect: he erroneously described the evidence of Dr McNulty and Dr Heydari as suggesting that the Appellant was suffering from "*very severe malfunctioning*" or "*severe cognitive difficulties*" (see paragraphs 35 and 45 of his judgment). This was not, however, what either Dr McNulty or Dr Heydari said in their reports. Indeed, their evidence was to quite different effect: both consistently described the Appellant's cognitive difficulties as "*mild*", *i.e.* at the other end of the scale. The FTTJ also appears, incorrectly, to have ascribed the comment "*[the Appellant's] reasoning being compared to a 7 or 8 year old child"* to the Appellant's experts (see paragraph 35) – when in fact it was something said by another witness, a Mr Kaurseed, who was a friend of the Appellant and not an expert (see paragraphs 42 and 45).

28. In my view, the FTTJ's fundamental misapprehension as to the import of Dr McNulty and Dr Heydari's evidence regrettably led him into serious error in his reasoning and findings and, ultimately, caused him to set his face against the Appellant's case and find against the Appellant.

29. The FTTJ's scepticism as to the Appellant's case is most apparent from his recurrent use of rhetorical questions. I highlight three passages in his judgment in particular. First, the FTTJ asked rhetorically at paragraph 39:

> *"39. …[I]f the appellant's mental problems were so obvious, that they were not picked up, either by his original legal representatives, or the interviewer at the asylum interview, or the social worker present at the interview and appeal, or by the Immigration Judge when the appellant was giving evidence. … No problems were picked up which, on the face of it, appears strange."* [Emphasis added]

30. Second, the FTTJ asked rhetorically at paragraph 41:

> *"41. …[I]f the appellant had such a low IQ and the severe cognitive difficulties diagnosed by the experts, then it seems at odds with that condition that the appellant was able to make several witness statements, finally consolidated into a very long 30 page appeal statement…"* [Emphasis added]

31. Third, the FTTJ then further asked rhetorically at paragraph 42:

> *"42. … If the appellant is so obviously suffering from cognitive malfunction and low IQ and, according to his friend, has the reasoning and ability of a 7 or 8 year old, then it is impossible, in my view, to ignore the clear view expressed by Dr Eling that the appellant "seemed to have no problems with recall, he did not hesitate and no difficulties with comprehension or with expressing himself. Unless Dr Eling is totally inefficient, her evidence stands in stark contrast with the evidence put forward on the appellant's behalf as to his mental problems."* [Emphasis added]

32. The FTTJ was clearly struck by what he perceived to be a major disparity between what the Appellant's expert evidence said about the Appellant's 'severe' cognitive difficulties on the one hand (as he mistakenly thought) and what the factual evidence, in fact, suggested about the Appellant and his abilities (*i.e.* that the Appellant appeared quite normal and capable) on the other:

> *"45. It follows from my above analysis that we have apparently cogent and consistent expert evidence, as to the severe cognitive malfunctioning of this appellant, which it is difficult to reconcile with is sophisticated appeal statement, notwithstanding the explanation given, and almost impossible to reconcile with the evidence of Dr Eling."* [Emphasis added]

33. It is apparent from the judgment that this caused the FTTJ to develop a high degree of scepticism about both the Appellant's expert evidence (which he plainly thought exaggerated the Appellant's condition) and about the Appellant himself, whom he described several times as *"tactically astute"*. The FTTJ clearly formed the strong view that the Appellant had somehow cynically manipulated the legal system and the medical evidence to his advantage:

> *"45. ....In my view, the appellant, notwithstanding a degree of cognitive and IQ problems, has shown that he is tactically astute. He has attacked his original lawyers and the original interpreters, being sufficiently aware of dialect problems in relation to his speaking Sorani, but has deliberately chosen not to call witnesses from his many friends who could, on the fact of it, clearly testify to his having problems. He has apparently deliberately avoided seeking medical help for his serious condition, as distinct from being content to obtain a diagnosis as to that condition".*
>
> *46. Whatever the degree of IQ and cognitive problems the appellant has, I do not accept that they are anything like to the degree stated in the experts' reports. He is, in my view, a person who is tactically astute and who can, albeit with a degree of difficulty, not simply give a basic account but, as he has clearly shown, can give detailed evidence as to his core history. Discrepancies were clearly found in that account and, so far as the Devaseelan principles are concerned, it is not a matter of whether I, or any other Judge, would have taken a different view but, rather, whether the original Immigration Judge was entitled to form the view he did take. There were discrepancies which cannot be explained, on my findings, by any problems in relation to the appellant's cognitive functioning. …"*

> *"55. The appellant is now an adult and, notwithstanding the medical evidence, I have found him to be tactically astute and capable of giving a fairly detailed account of whatever he considers it necessary to speak about."* [Emphasis added]

Respondent's response

34. Ms van Overdijk, on behalf the SSHD, made two main points in response under Grounds (2) and (3). The first was that it was important to have regard to the context in which the FTTJ was considering the medical evidence, namely, on the basis that the AITJ has made a clear and unequivocal finding that the Appellant's account of being an alcohol smuggler was "*thoroughly implausible*" (see above); and seen in this context, the FTTJ was entitled to conclude that the Appellant's psychological evidence was not sufficiently compelling to displace the AITJ's original finding. The second was that, as the FTTJ explained "*[t]here were discrepancies which cannot be explained, on my findings, by any problems in relation to the appellant's cognitive functioning*" (see paragraph 46).

35. In my view, however, neither of Ms van Overdijk's points is capable of rectifying the fundamental flaws in the FTTJ's approach to the evidence and the Appellant's case. As explained above, it is clear that the FTTJ's fundamental misapprehension as to the Appellant's medical evidence led him to a series of errors when it came to analysing the Appellant's case.

36. In my view, it is possible that, had the FTTJ understood and approached the expert evidence correctly, he might have formed a different view as to the central question before him, namely whether "*... the implausibility and inconsistencies in the Appellant's account were due to his cognitive difficulties and low IQ*" (paragraph 35).

Summary on Grounds (2) and (3)

37. In summary, in my judgment, for the reasons I have elucidated above, the FTTJ's findings and conclusions in this case were, at least, partly based on his own flawed understanding of the medical evidence and are, therefore, on their face, unsustainable. They amount to significant errors of law which vitiate the FTTJ's decision.

38. The gravamen of the medical evidence of Dr McNulty and Dr Heydari, properly read and understood, together with the Appellant's young age, arguably provided a plausible explanation for the infelicities and inconsistencies in the Appellant's account which formed the basis of AITJ JFW Phillips' original adverse finding on credibility. Accordingly, on this basis, it is arguable that the FTTJ could have concluded that the adverse finding of the AITJ as to the Appellant's credibility was unsafe.

39. In my view, Grounds (2) and (3) are made out and are sufficient to determine this appeal in favour of the Appellant.

Grounds (4) and (6)

40. In the light of my above conclusion, it is not necessary to consider the matters raised by the Appellant under Grounds (4) and (6), save to say that none of the further points raised by Ms Weston QC would appear to have any real merit.

Conclusion

41. For the reasons given above under Grounds (2) and (3), I would allow this appeal.

Postcript

42. There is an increasing tendency for First-Tier judgments to be overly long and to contain unnecessary detail. This can, itself, cause problems of consistency and cogency. Laborious recitation of every piece of evidence is not necessary or desirable and simply adds to the already heavy burden on First-Tier judges. It is only necessary to refer to evidence that is relevant to the issue or issues for determination. Length is no substitute for analysis.

LORD JUSTICE LEGGATT:

43. I agree.

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT:

44. I agree.