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

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons promulgated**
On 1 December 2021	**On 10 December 2021**

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

AN
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Eaton instructed by Duncan Lewis & Co Solicitors.
For the Respondent: Mr Tan, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appealed with permission a decision of First-tier Tribunal Judge Welsh ('the Judge') promulgated on 8 January 2019, in which the Judge dismissed his appeal on all grounds. By a decision promulgated on 25 April 2019 Deputy Upper Tribunal Judge Zucker found no material error of law in that decision.

2. By an order sealed on 13 November 2019 the Court of Appeal granted permission to appeal on the basis it seemed to that Court that the decision of the First-tier Tribunal suffered from the same flaws as that identified in AS (Afghanistan) [2019] EWCA Civ 208 which had been promulgated shortly before the decision before the Deputy Judge, but which had not been brought to the Deputy Judge's attention before promulgating his decision, which the Court of Appeal found amounted to compelling reasons for granting permission for a second appeal.

3. A consent order sealed on 11 December 2019 allowed the appeal remitting the case to the Upper Tribunal for it to determine the appellant's appeal in light of AS (Afghanistan).

4. The Upper Tribunal gave directions for the future conduct of the appeal on 27 April 2020, which was subsequently replaced by a Notice and Directions dated 5 May 2020, but in response to which the appellant filed amended Grounds of appeal in a document dated 12 May 2020.

5. The appellant's grounds incorporated the first ground of the application for permission to appeal of 22 January 2019, that the First-tier Tribunal had employed an erroneous approach in the assessment of the expert medical; a psychiatric report prepared by Dr Naresh Kumar, adopted grounds two and three of the earlier application, and pleaded a new ground that removal will breach the appellant's rights pursuant to article 3 ECHR on health grounds; following the Supreme Court handing down its judgement in the case of AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17.

6. There is an earlier document filed by the Secretary of State's representative dated 12 May 2020. The operative part of which reads:

> 4. Having seen the consent order from the Court of Appeal proceedings, the SSHD accepts that there is a material error in the decision of the FtT. That is on the basis of the unfortunate numerical mistake made by the UT in the previous Afghan CG AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC).
> 5. The SSHD accepts that the matter should now be substantively reconsidered on the basis of AS [2020] UKUT 130 (IAC). The SSHD accepts that the hearing should be an oral one. As already clarified with the Tribunal, the SSHD does not accept that Skype video is (currently) a safe method of carrying out a video hearing are, the SSHD is however happy to participate in a telephone hearing. The relevant SPO's details and contact details will be circulated once the UT issues a hearing notice.

7. A document headed SSHD's skeleton argument dated 27 May 2020 was filed as a response to the directions of 5 May 2020, the relevant part of which is in the following terms:

> SUBMISSIONS
>
> 2. In respect of the Appellant's Grounds of Appeal (GoA) . It is contended that no material error is disclosed in the FTTJ's approach to the evidence of Dr Buttan. The FTTJ was required to consider this holistically as part of the credibility assessment and 'weight' was ultimately a matter for the judge. The report Dr Buttan was predicated (as to risk on return see Para 8.13.1) on an acceptance that the Appellant was being truthful as to witnessing his brother's death and

being genuinely at risk of persecution (see Para 8.13.2/8.13.3). The report gives a variety of factors contributing to the Appellant's mental health (see Para 8.4.1(b)(c), 8.5.4 and 8.7.1).

3. The FTTJ considered the medical evidence as new information (Para 15/16, 21-24) , but ultimately considered the evidence as a whole and gave cogent reasons for why the report of Dr Buttan was not given the weight the Appellant may have wished it was. The FTTJ appropriately taking Devaseelan as a starting point (Para 36/38) before giving cogent reasons for why the Appellant was incredible (Para 39-41). It is submitted that the decision is clear that the FTTJ did not make an adverse finding before considering the medical report, rather the medical report was considered as part and parcel of all the evidence available (or lacking – see Para 41(2) regarding the absence of an alleged arrest warrant).

4. Whilst the SSHD has conceded material error in respect of the FTTJ's reliance upon 'AS' at the time of decision (SSHD's response of 12.5.20 -Para 4/5) . It is contended that the challenge to the FTTJ's assessment of risk on return and the reasonableness of internal relocation has been undermined by the fact the country guidance case of 'AK' (relied upon by the FTTJ at Para 45-48) remains good law as was re-confirmed recently in AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC). The FTTJ being entitled not to depart from the same without strong evidence and the rejection of the evidence relied upon can hardly be considered irrational in light of the background evidence considered and rejected in the recent remaking of 'AS'. The SSHD would invite the Tribunal in any remaking to dismiss the Appellant's argument accordingly.

5. Given the legal change in consideration of Art 3 (medical) as set out in AM (Zimbabwe)(Appellant) v Secretary of State for the Home Department (Respondent) [2020] UKSC 17 the SSHD has no objection to the Appellant amending their GoA to include the same. However, noting the still high Art 3 (medical) threshold the SSHD would query how this high hurdle is met if the Appellant was found not to have witnessed his brother's murder (the existence of which is itself a credibility point) or being at risk of persecution on return, both being at the findings of the FTTJ. It is observed that the Appellant has not evidenced current/recent suicidal ideation before Dr Buttan (see 6.3, 7.4, 8.7.1 – 8.7.3, and 8.10.1) and much of that risk was predicated upon the acceptance of a fear of persecution cogent rejected by FTTJ Welch.

CONCLUSION

The SSHD accepts that there is need of a remaking hearing in the UT , in light of the recently promulgated decisions of AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC) and AM (Zimbabwe)(Appellant) v Secretary of State for the Home Department (Respondent) [2020] UKSC 17 . The SSHD would, however, invite the tribunal to preserve the adverse credibility findings of FTTJ Welch.

8. Further directions issued by the Upper Tribunal dated 22 July 2020 indicated that the matter should be listed for a Case Management Review which occurred on 22 October 2020 before Upper Tribunal Judge Sheridan, resulting in further directions of 26 October 2020, which granted permission to amend the grounds in accordance with a copy provided by the appellant and which, in relation to the error law hearing directed at [7]:

7. I therefore accept the argument of Mr Lindsay that the matter should be listed for an error of law hearing in which (a) the grounds of appeal not conceded

> can be determined; (b) a decision can be made on which findings of fact, if any, will be preserved; and (c) a decision can be made on whether the decision should be remade in the Upper Tribunal or the appeal remitted to the First-tier Tribunal.

9. Those directions purported to set out the scope of the hearing before the Upper Tribunal today.

10. It appears that at some point the case has gone procedurally awry in that it appears that at the earlier directions hearing the Tribunal conflated the procedure it needed to follow if permission to appeal to itself had been granted on a 'Cart' application by the High Court, where the issues to be determined would be those directed by Judge Sheridan as being at large, namely whether there had been an error of law in the decision of the First-tier Tribunal, rather than an appeal in which permission to appeal to the Upper Tribunal had already been given, which led to the decision before Deputy Judge Zucker which was set aside, and in which the scope of the further hearing was that determined by the Court of Appeal.

11. The specific terms of the grant of permission to appeal to the Court of Appeal by Lord Justice McCombe are in the following terms:

> (1) It seems that the decision of the First-tier Tribunal in this case suffers from the same flaw as that identified in *AS (Afghanistan) v SSHD* [2019] EWCA Civ 208 and 873. The decision is a preliminary hearing in this court in *AS* has been given shortly before the argument in the Upper Tribunal in this present case but did not come to that Tribunal's attention before the promulgation of the decision under appeal on 25 April 2019. It was, however, cited in the application to the Upper Tribunal for permission to appeal to this court. The point is not dealt with in the decision of 22 May refusing permission to appeal.
>
> This presents a compelling reason for granting permission for a second appeal. The Respondent should consider very carefully whether she should agree to this case been remitted to the Upper Tribunal before this present appeal is heard and before further costs are incurred here.
>
> (2) Ground 2 has no real prospects of success. The First-tier Tribunal Judge gave wholly cogent reasons for finding that the report of Dr Buttan had little weight: see paragraph 40.

12. The scope of the hearing before the Upper Tribunal is therefore limited to reconsidering any risk the appellant will face on return based upon country conditions prevailing at the date of the further hearing and in light of all other findings of the First-tier Tribunal Judge being preserved.

13. It was not open to Mr Eaton to attempt to re-argue the merits of the appeal based upon medical issues, and it is not entirely clear to us why the grounds were amended to refer to AM (Zimbabwe) when any challenge to the medical evidence was rejected by the Court of Appeal. There is insufficient evidence to show the appellant's claim comes anywhere near the threshold required to establish an Article 3 medical case in light of the guidance provided by the Supreme Court.

14. Similarly it is not open to Mr Eaton to attempt to argue a Convention reason based upon an assertion the appellant fell within a Particular

Social Group on the basis of his mental health needs, in line with the report decision of the Upper Tribunal of DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 223 (IAC). There is insufficient evidence to support the contention that the appellant's mental health issues are sufficient to allow him to succeed in light of the guidance provided in DH.

15. It is accepted by all parties that there have been material changes to the situation in Afghanistan following the Taliban regaining control of the country. Consideration has to be given to the fact that the appellant's claim has been found to lack credibility by the First-tier Tribunal Judge but that does not alter the situation he will face on the return to Afghanistan. That reality was accepted by Mr Tan on behalf of the Secretary of State; leading to the outcome of this appeal being agreed in the following terms:

BY CONSENT

The appellant is entitled to a grant of humanitarian protection.

16. We allowed the appeal on that basis

Decision

17. We allow the appeal.

Anonymity.

18. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed
Upper Tribunal Judge Hanson

Dated 2 December 2021