

Landmark decision on “particular social group”

DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 223 (IAC) is an important case for numerous reasons. It affirms the supremacy of the Refugee Convention 1951 over EU law by reference to the Convention’s object and purpose; it recognises for the first time in UK asylum law that a “person living with disability or mental ill-health” may qualify as a member of a particular social group (PSG); and it clarifies the correct legal approach, overturning previous unhelpful tribunal authority, approving obiter comments of the House of Lords as well as affirming the UN Refugee Agency guidelines (helpfully annexed to the decision) making it easier to establish a PSG in all cases.

Summary of the findings

The official headnote provides:

- 1. The Geneva Convention relating to the Status of Refugees 1951 provides greater protection than the minimum standards imposed by a literal interpretation) of Article 10(1)(d) of the Qualification Directive (Particular Social Group). Article 10 (d) should be interpreted by replacing the word “and” between Article 10(1)(d) (i) and (ii) with the word “or”, creating an alternative rather than cumulative test.*
- 2. Depending on the facts, a ‘person living with disability or mental ill health’ may qualify as a member of a Particular Social Group (“PSG”) either as (i) sharing an innate characteristic or a common background that cannot be changed, or (ii) because they may be perceived as being different by the surrounding society and thus have a distinct identity in their country of origin.*
- 3. A person unable to secure a firm diagnosis of the nature of their mental health issues is not denied the right to international protection just because a label cannot be given to his or her condition, especially in a case where there is a satisfactory explanation for why this is so (e.g. the symptoms are too severe for accurate diagnosis).*
- 4. The assessment of whether a person living with disability or mental illness constitutes a member of a PSG is fact specific to be decided at the date of decision or hearing. The key issue is how an individual is viewed in the eyes of a potential persecutor making it possible that those suffering no, or a lesser degree of, disability or illness may also qualify as a PSG.*
- 5. SB (PSG – Protection Regulations – Reg 6) Moldova CG [2008] UKAIT 0002 and AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC) not followed.*

Background: a result against the odds

It’s amazing that DH made it so far. Unseen from the judgment are the obstacles he faced accessing justice as someone lacking litigation capacity and suffering from serious mental illness. While litigation friends at the tribunal are becoming increasingly established, this was an early example.

DH lodged his appeal while detained and the tribunal proceeded to list his full hearing without any case management procedure and refused to adjourn the hearing – several times – to allow for the appointment of a litigation friend. It was only following a successful

application for interim relief preventing the substantive appeal from proceeding that the hearing was adjourned and DH could be properly represented. This had the additional consequence that the First-Tier Tribunal changed its practice, establishing pre-hearing reviews for detained appeals to allow such issues of procedural fairness to be raised.

DH was also unlawfully detained, released from detention into street homelessness without notice. During his First-tier Tribunal appeal, the Home Office Presenting Officer said loudly, within hearing of the litigation friend, that he was determined to have DH deported.

A nuanced approach to mental illness in protection appeals

We've all seen or heard cases argued on the basis that protection should be granted on the basis of some vague and unsubstantiated assertion of "vulnerability due to mental ill-health". In this judgment there is a refreshing attempt to grapple with different mental illnesses by cause, type, degree, seriousness etc.

Cause: "The evidence made available fails to establish there is a clear consensus regarding the cause of mental disabilities. There are five recognised models of mental health being behaviourism, biological, psychodynamic, cognitive, and humanistic." [Paragraph 80]

Type: "The phrase 'mental disability' now commonly used in this area of work is taken to encompass both mental ill health, learning disabilities/developmental disorders/ neuro-diverse conditions, and brain damage, but there are fundamental differences between these conditions and they should not be confused. There is also a range of mental health conditions, e.g. depression / anxiety, post-traumatic stress syndrome, obsessive compulsive disorder, personality disorders, eating disorders, schizophrenia, bipolar disorder. Other mental impairments or neuro-diverse conditions include autism, learnings disabilities, and 'specific learning difficulties' such as dyslexia". [41]

Degree: "Similarly, the degree of disability in each individual's case will vary enormously..." [42].

Seriousness: "If an appellant is claiming to belong to a PSG based upon their mental health there must be sufficient cogent evidence to enable a clear finding to be made that such a person is suffering from serious mental illness. I use the term 'serious mental illness' as there are a number of mental health issues which can in themselves vary in degree, but which enable a person to function without any obvious external indicators or risk factors, as noted above" [43]. 'Serious mental illness' includes diagnoses which typically involve psychosis (losing touch with reality or experiencing delusions) or high levels of care, and which may require hospital treatment, the most common of which are schizophrenia and bipolar disorder (or manic depression). It is a fact sensitive question in every case..." [44].

Less serious illnesses are not to be excluded: "Whilst I refer above to 'serious mental illness' I accept the key issue is how an individual is viewed in the eyes of a potential persecutor making it possible that those suffering a lesser degree of illness may also face a real risk. This requires a fact specific assessment depending upon the nature of the illness, how it manifests itself, and country conditions. It is also the case that many problems experienced by those suffering mental health issues are as a result of ignorance grounded in a lack of understanding of an individual's mental health problems and how the same will, ordinarily, manifest themselves". [79]

Diagnostic labels don't matter if explained: "A person unable to secure a firm diagnosis of the nature of their mental health issues cannot be denied the right to international protection just because a label cannot be given to his or her condition, especially in a case where there is a satisfactory explanation for why this is so, as in this case. Most treatments in the mental health sector require a medical diagnosis to enable a doctor to prescribe a course of treatment to enable that person to function as best they can. If no treatment is available the condition remains present and cannot be changed and is likely therefore to be immutable." [86]

Future treatment: "Mr Bandegani [counsel for DH] submitted that whilst the issue of possible future treatment may be thought relevant to the question how people with mental or physical disabilities are perceived or treated by society in their home countries, it must always be noted (a) the existence of a healthcare system will usually say very little about how society views or treats the PSG, and/or whether the state discriminates against them generally and/or is willing to protect them i.e. there may still be deeply-embedded institutional social stigma and discrimination against the group regardless of, for example, the existence of a hospital; (b) the specific treatment required may not in fact be available, accessible, affordable, or adequate in any event; (c) the form that treatment takes in the country in question may itself give rise to a real risk of persecution, serious harm, or other human rights breaches (including flagrant breaches) such as being detained, isolated, chained, caged, beaten, or experimented upon. As general observations this must be correct but whether such factors exist and their impact is, again, fact specific" [87]. Note that in relation to Afghanistan specifically, it was accepted in *AS (Safety of Kabul) Afghanistan CG* [2020] UKUT 130 (IAC) that psychiatric services in the country are "inadequate".

The Upper Tribunal was rightly keen to emphasise that establishing membership of a PSG – applying either the innate characteristics test, or the social perception test – is one part of the refugee definition. It is different to establishing a real risk of being persecuted which is most likely to arise due to the person's "behavioural traits" [42], "obvious external indicators" [43] or, as noted above, where treatment

for the illness constitutes ill-treatment contrary to the Refugee Convention 1951 or the European Convention on Human Rights. But as the tribunal was also keen to emphasise, ultimately each case must be assessed on its own facts.