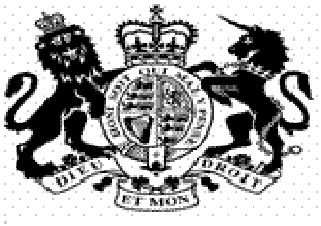

Upper Tribunal
(Immigration and Asylum Chamber)

BN (psychiatric evidence – discrepancies) Albania [2010] UKUT 279 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 13 May 2010

Before

Mr Justice Ouseley
Senior Immigration Judge Latter

Between

BN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Griggs
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

(1) *The Tribunal is entitled to reject a clinical diagnosis that an appellant suffers from a depressive illness but it must give clear reasons for doing so which engage adequately with a medical opinion representing the judgment of a professional psychiatrist on what he has seen of the appellant.*

(2) *In the present case where the psychiatric evidence was being relied on to provide an explanation for admitted discrepancies in the appellant's evidence, the psychiatrists' comment on the role of depression in explaining inconsistencies could not and did not even purport to deal with all the aspects of the claim which the Immigration Judge had found incredible.*

(3) *On the facts of the present case even taking the diagnosis as correct, it provided no reasonable explanation for the many aspects of the appellant's evidence and behaviour which led to the rejection of his claim as credible. Accordingly, if there were any error of law in what the Immigration Judge had concluded in relation to the diagnosis, the error had no effect on the result.*

DETERMINATION AND REASONS

Introduction

1. The Appellant is a male citizen of Albania born in 1987 who entered the United Kingdom clandestinely on 6 December 2008 and claimed asylum on 12 December 2008. His application was refused in a detailed letter of 17 February 2009. The basis of the asylum claim was that he had deserted the army, into which he had been conscripted, following his discovery in the communal bathroom in the barracks having sex with a soldier. He feared that he would go to prison, that he would be beaten up and tortured and that the brother of the soldier he was discovered having sex with would kill him.

2. In her determination of 7 August 2009, Immigration Judge Ransley rejected his claim because she did not find these incidents credible or that he was a homosexual. The appellant sought reconsideration of that decision on the grounds that the Immigration Judge had erred in law in her consideration of two psychiatric reports, which diagnosed the appellant as suffering from depression. One of these referred to depression as the cause of the discrepant accounts between the screening interview and the asylum interview about when the act of homosexual intercourse happened. The Immigration Judge, it was said, had treated the date on which the incident was said to have been discovered as crucial in her rejection of the appellant's credibility and to have erred in her rejection of the psychiatric evidence about depression and its significance.

3. Reconsideration was ordered by Mr Justice Langstaff on 18 February 2010. He gave five reasons for his conclusion that, although the Judge was not bound to accept expert evidence even when uncontradicted, she had to give adequate reasons for rejecting the diagnosis of depression which, it was said, went to what was arguably the critical point in the Judge's rejection of the appellant's credibility namely, the discrepancies over when this sexual incident occurred. Arguably she had failed to give adequate reasons.

4. The matter comes before us as if permission to appeal to the Upper Tribunal has been given. It is for us to decide whether there was an error of law, and if so, whether it was material to the decision. We accepted the submission that, were it to be material, the appeal would have to be considered with further evidence, which for various reasons was not available at the date of our hearing.

The processing of the claim

5. In order to understand the significance of the Immigration Judge's approach, it is necessary to consider how matters developed before the appeal.

6. At the screening interview, by which time the appellant had already instructed his current solicitors, he gave a fairly detailed account of how he had left Albania in mid October 2008, had arrived in the United Kingdom and about what he had done on arrival here. He said that the reason for his coming to the United Kingdom was that he had been called up for military service in August 2008 until October 2008; he was mistreated by other soldiers because he was the only one from a particular area and had no friends. He had been picked on because he was found having sex with another man and would be tortured and beaten up if returned, and the brother of the other soldier involved would kill him.

7. Following that interview, his solicitors wrote to the Home Office on 5 January 2009, saying there had been a misunderstanding between the appellant and the interpreter as to what he had said. The solicitors then enclosed, with a letter of 28 January 2009, a statement from the appellant about what he said had happened at the screening interview and about what he had actually said. The account in this statement, the letter said, was "somewhat different to the account contained in the screening interview", and the solicitors expressed concern that the interpreter was allowed to continue to interpret for the appellant. The appellant's statement did indeed make complaints about the female interpreter, who he felt had "maliciously damaged" his case. He had been unable to understand her accent fully. She had accused him of

lying about whether he had a phone number, had accused him of lying throughout the interview and had taken his mobile phone out of his pocket without his consent. She had talked to a Home Office representative for at least 10-15 minutes, none of which was interpreted to him. The questions were asked in a very confrontational manner, leaving him extremely nervous and confused. The interpreter accused him of lying about his cousin, whom she said was really his fiancée. When he managed to have the screening interview translated, he said that he was shocked to learn what had been written in it. He then set out what he said was the true position in relation to his cousin, the details of his journey to the UK and what happened on arrival. He did not suggest that the August 2008 date he had given for when he was conscripted into the army was wrong.

8. The asylum interview in fact had taken place on 27 January 2009. After that interview the solicitors wrote on 3 February 2009 to the Home Office complaining that the same interpreter had been used. They asked for a typed version of the interview but using such interview notes as they had been able to decipher, the appellant corrected a number of his answers on points of detail. None of the corrections are of themselves germane to the issues in this appeal, save that they added to his answer to Question 151, which asked whether he had any medical conditions and to which he had answered no, "the client is not well and this is what his answer should have been, he misunderstood the question and believed he was being asked about [how he felt] during the interview. The client suffers from depression". The appellant had not been represented during that interview. The absence of corrections to the substance of his other answers, coupled with the fact that he did correct some very detailed points, is however of some importance.

9. The Secretary of State's refusal letter of 17 February 2009 is a detailed analysis of the claim that the appellant was a homosexual. It went in considerable detail through inconsistencies between the asylum interview and the screening interview, and improbabilities in the account given in the asylum interview. These included the fact that in the asylum interview he said that he had started military service on 15 June 2008, but had said that that was in August 2008 in his screening interview. He suggested in his asylum interview that his problems started on 20 July 2008 and dated the incident when he was seen having sexual intercourse with another soldier in the communal baths to about two weeks after 20 July 2008. The letter said that he could offer no explanation as to why this difference had arisen. It also noted that he had been able to give several specific dates in his asylum interview, but could not recall the specific date of such a significant incident.

10. Improbabilities were considered such as the choice of the communal bathroom for sexual intercourse with another soldier, when he was trying to keep this sexual relationship secret. He said that he had been ill treated by the other soldiers the next day, but they had not pursued their threats because "the gong sounded and they had to go" and the senior officer who found him tied up naked on the ground did not ask him why he was lying on the floor naked. He also said that he had been stabbed whilst shaving by a fellow soldier a few weeks before because this solider had wanted to use the mirror and the appellant had told him it was not his turn to do so. He could only state that this stabbing had happened in the second month of his military service. It was thought odd that he could give specific dates when he started the military, deserted the military, left Albania and left Kosovo, but could give no indication of the date of the incident when he was stabbed. He had said that he was bleeding severely and was left for dead, but had managed to get himself to hospital by himself, walking to the pharmacy and then taking a taxi to the hospital. He showed a scar on the right hand side of his back, which is where he said it had happened. It was thought unlikely that he would have embarked on an illicit homosexual relationship with another male soldier in a communal area soon after his return to barracks, if he had felt that he was already being targeted by other soldiers because of where he came from. He was never charged with any offence against military discipline or any civilian offence.

11. The letter also drew attention to differences between the initial letter sent by the solicitors on 10 December 2008 outlining the basics of the claim, which included that he had escaped from military service because he did not agree with what he was seeing, said so, and as a result was tortured, and what was said at the screening or asylum interview.

12. He also said in interview that he had told his legal representative the details of his alleged homosexual encounter at his very first meeting with his solicitors, but they had only referred in their letter of 10 December 2008 to a private matter which he wished to add, "but he is not able to express this at this stage and further instructions will need to be obtained in this regard". He then had said in interview that he had not told his solicitor about this at the first meeting, to explain the inconsistency, because the interpreter was a male interpreter who might torture him like the soldiers had done. The solicitor's letter of 3 February 2009 explained this by saying that he had told them of his homosexuality at their first meeting but not in detail, because he was nervous at this first meeting. The SSHD pointed out that the letter

made no reference to a male interpreter and fear of torture as an explanation, although it was what had been proffered at interview.

13. The SSHD then turned to the letter from the solicitors of 3 February 2009, dealing with Question 151, and pointed out that he had been told at the beginning of the interview to raise any understanding/interpretation issues and was asked at the end whether he was feeling fit and well and had understood all the questions. It was noted that there had been no medical evidence yet to suggest he was suffering from depression. There were then specific rebuttals of the claims about the interpreter's actions before the letter turned to inconsistencies between the two interviews over his account of how he left Albania and then Kosovo.

The psychiatric evidence

14. A hearing of the appeal was set for 5 June 2009. The appellant was interviewed for a medico-legal report by Professor Prasher, a professor in Neuro-Developmental Psychiatry. He produced a report dated 5 May 2009. The appellant gave a history on examination of feeling "spaced out" and not his normal self, complaining of not eating or sleeping and of having nightmares especially of the police trying to catch him, and at times feeling that people were trying to harm him. This made him scared of being found and returned to Albania. He was said to be on anti-depressants and sleeping tablets, but his compliance with medication had been poor. Professor Prasher said of his mental state examination that the appellant presented with "quite marked psychomotor retardation during the interview with very little body and facial movement. His speech was slow and monotonous and very few responses at times to questions. His speech was slurred and quite flat in tone, his mood was low but there were no overt hallucinations or delusions. Rapport was not established, and cognitively he said that he did not know the day, month, or year, at times saying "nothing to do with me" to questions. He said his age was 21 but could not give his date of birth. He was able to name his Mom and Dad. He was able to answer the questions which were asked of him by the interpreter. I was unable to formally test his memory."

15. Professor Prasher's impression was that the appellant presented with being mentally unwell and his presentation was atypical. There were several possibilities, one of which was over-sedation with medication, the second was an underlying depressive illness with paranoid ideas and the third was malingering. The Professor could not say which of the three was the primary presentation and it could be a combination of two or three as well. His level of intelligence fell within the normal IQ range for an Albanian and he recommended that he see the

appellant again when he had not been given medication for three days, so as to exclude medication sedation as a cause of his presentation.

16. On 4 June 2009, following a further examination, Professor Prasher provided another report. The appellant had not taken any medication for the preceding few days. He said he felt a little better but described much the same symptoms and, from the report's description, the mental state examination was very similar. He was again unable to give the correct day, month or year, saying that was not in his mind. He could not give his date of birth. He was unable to remember his parents' names this time, saying he did not want to remember. Professor Prasher concluded that his mental state was not due to the effects of medication. In his opinion the appellant was suffering from a "moderately severe depressive illness" with an increased risk of suicide; he required further and more appropriate treatment for his mental illness.

17. Professor Prasher in response to a further letter of 4 June 2009 from the solicitors then offered two further opinions: "in my medico-legal opinion [the appellant] is not fit to give evidence at the hearing arranged for 5 June 2009, as my report states [the appellant] suffers from a mental illness-depressive state – as defined by World Health Organisation criteria. 2. In my opinion [the appellant] has given different accounts to the Home Office due to his mental stage being moderately depressed". This is the first time those opinions were expressed and they were expressed in extremely short terms.

18. The hearing shortly after this, at which the appellant was present, was adjourned because the Home Office interpreter was the very one about whom the appellant had made complaints in relation to the screening and asylum interviews. It was agreed, at the next hearing, that the opinion of Professor Prasher that the appellant was not fit to give evidence, had not been the first Immigration Judge's primary reason for adjourning the hearing. The hearing was then fixed for 22 July 2009 before Immigration Judge Ransley this time.

19. Two further psychiatric reports were provided, including a third one from Professor Prasher. This dealt in a little more detail with the issues of fitness to give evidence and inconsistencies in interview. Professor Prasher affirmed his opinion that in May and June the appellant had been suffering from a moderately depressive illness. He referred to his observations in his report of 5 May 2009 and simply commented: "In my opinion [the appellant] is not fit to give evidence due to the presence of a moderately severe depressive illness. He would have significant impairment in court in his mental faculties due to his poor concentration, low mood, poor recall, memory, paranoid ideas and lack

of rapport. He will not at times be able to listen to questions, fully understand questions, recall information accurately and reliably. He will in my opinion at times not answer questions at all or will give answers without thought. He might also become distressed, but methods could be adopted to minimise the problem".

20. Professor Prasher turned to the inconsistencies: because of the depressive illness, the appellant had impairment in concentration, memory recall and sense of time. His inability to establish rapport with his interviewer and his pessimistic thoughts "means that he will at times not give answers, give answers without thought i.e. say the first thing that comes into his head or confabulate answers. In addition chronic poor sleep and chronic poor self care would aggravate his mental illness."

21. Professor Prasher commented further on suicide risk and then turned to an issue upon which he had been asked to comment for the first time, namely mental capacity. He said that mental state could vary depending upon time and issues, and although it was possible that the appellant lacked mental capacity with regards to legal matters, he "recommended an assessment of capacity closer to the time of the next hearing."

22. There was no further report from Professor Prasher, but on 15 July 2009 Dr Van Woerkom, a consultant psychiatrist, produced a report on the appellant's behalf. He interviewed the appellant on 10 July and said that he had seen the two earliest reports from Professor Prasher. He did not mention the most recent one. He said the interview was a little difficult because the appellant appeared quite depressed and retarded at present. He was not taking any medication at present. At the interview he appeared very subdued, flat, retarded, lifeless, slow in his responses and without eye contact, describing low mood, loss of interest and pleasure, lethargy, anxiety, panic attacks, reduced appetite, weight loss, poor concentration and regular severe nightmares. Dr Van Woerkom said that "his mood objectively and subjectively appears very low". Clinically he presents as having a good going, moderately severe, retarded depressive illness". There were also some features of post-traumatic stress. There was "obvious marked psychomotor retardation, almost at times seeming to lack the energy to respond to even basic questions such as his age etc, but I do not think he could be malingering these symptoms as he seems genuinely lethargic, slowed up with psychomotor retardation." The appellant was "severely depressed" and needed therapy and monitoring to support him and to try to reduce the quite visible risks of suicide. He dealt with the appellant's ability to give evidence at the Tribunal, saying "given that I was able to extract quite a lot of

information from him, although with some difficulty, I think it would be possible for [the appellant], notwithstanding his difficulties, to attend and attempt to give evidence at the tribunal hearing." He then referred to the suicide risk and anxieties on return. However, he thought that with appropriate skilled treatment in the UK in the form of effective anti-depressant therapy he should be able to make a reasonable recovery within 3-4 months. He added simply this on inconsistencies "he says that at his very first interview with immigration he was given a very poor quality interpreter and that this may have given rise to some apparent inconsistencies, although his poor mental state may have been a factor." It is not clear how much of the last phrase is the appellant speaking or the psychiatrist.

The appeal

23. The appellant did not attend the hearing of his appeal. This appears to have come as something of a surprise because his advocate said that, on the morning, his solicitors had tried to contact the appellant by his mobile phone without success and they had no explanations for his non appearance; he had appeared on the previous occasion. His advocate then said that in those circumstances he still felt "under a professional duty" to apply for an adjournment which was opposed. It was refused by the Immigration Judge because the substantive hearing of the appeal had been adjourned on two previous occasions. There is no evidence that the appellant was unfit to attend the hearing and in all the circumstances she thought it appropriate to refuse the adjournment. It is not suggested that that was an error of law and forms no ground of appeal.

24. This however meant that the only evidence from the appellant before the Immigration Judge were the contents of the two interviews, together with the statement he had made in response to the first interview and the solicitor's letters before the first interview and after the second. Neither of the psychiatrists attended to give evidence. The appellant's advocate was then very clear as to the role he saw the psychiatric evidence as playing. He was not relying on the reports "to increase the credibility" of the appellant's account, that is to say to provide support for the credibility or plausibility of what the appellant said had happened. Rather, he only relied on the clinical diagnosis to explain the discrepancies in the account and to establish an Article 3 claim based on the suicide risk on return. He said that the appellant no longer relied upon the problems with the interpreter as being the cause of the discrepancies between the two interviews. We interject at this stage to say that Mr Grigg, who appeared for the appellant before us, accepted that the alleged error of law in relation to the treatment of the psychiatric evidence really only went to the credibility issue through

the explanation it was said to offer for inconsistencies. He accepted that if this credibility point failed, the psychiatric evidence of a depressive illness, even if accepted at face value, would not provide a sufficiently strong case for return to breach Article 3 ECHR.

The Immigration Judge's determination

25. The Immigration Judge, in her analysis of the appellant's credibility, thought that the credibility issues arose not just directly in relation to the core elements of the claim, but also because of the appellant's conduct and tactics in pursuit of his claim. She was entitled to conclude and this is not at issue, that the appellant had not mentioned any mental health problem at the screening interview, that his first instructions before the screening interview said that he had deserted because he did not agree with what he saw and was required to do, which had led to torture. She rightly pointed out that this was not what he had said at his screening interview, which was that he had been ill treated because of where he came from and his being in love with another soldier. She agreed with the Secretary of State who had found the appellant not credible in his account of a senior officer finding him lying naked on the floor with his hands tied up, untying him without asking any questions; and in not believing that the Albanian police would have twice failed to find him when he was in a hut or barn some 50 metres only from the family home. She concluded that the appellant had failed to provide any satisfactory explanation to resolve those or any other of the many credibility issues raised by the respondent.

26. She then turned to discrepancies in the critical dates and in particular how, if he had only joined the military in August 2008, the core incidents could have happened in July 2008. He had said in his substantive interview that he had joined the military service in June, volunteering the precise date of 15 June 2008, but had said in his screening interview that he had joined the army in August 2008. The Immigration Judge commented, and having read the record we agree, that the appellant had been unable to give any reasonable or satisfactory explanation for this at his asylum interview. It was evident, concluded the Judge, that he had been internally inconsistent about the sequence of events and timeframe of his asylum claim, even within the interview. He put the time when he was caught having sexual intercourse in the communal bathroom at about two weeks after 20 July 2008, the date he gave for when his problems had begun. He had been caught in the showers about three weeks after he had returned from hospital, where he had gone after the soldier had stabbed him while he was shaving.

27. Towards the end of the asylum interview, in reply to Question 151, the appellant had clearly said that he had no medical conditions. The Immigration Judge concluded that the real purpose of the solicitor's letter of 3 February 2009 was to deal with his answer to this question. She also found it highly significant that notwithstanding the serious allegation that the Home Office interpreter had maliciously damaged his case at the screening interview, nothing had been said about that in the six week period between the screening interview and the substantive asylum interview, that is until 23 January 2009 and the letter of 28 January 2009, which arrived at the Home Office the day after the substantive interview. The Immigration Judge pointed out that misunderstandings between appellant and interpreter were merely asserted. The appellant did not seek to assert any inaccuracies in the record or specific misinterpretation by the Home Office interpreter in his 23 January 2009 statement. (This does not appear quite correct, but none of the points are significant.) The Immigration Judge was certainly entitled to draw this conclusion in relation to the screening interview record: "however looking at the screening interview record as a whole I could find no real evidence of any language barrier between the appellant and the interpreter. The appellant gave appropriate answers to the questions asked and in some cases he gave fairly detailed answers. I have no reason to believe that the Home Office interpreter would have invented those answers or that the interpreter acted in a way to "maliciously damage" the appellant's case as he alleged".

28. The Immigration Judge also rightly noted that, although a letter dated 3 February 2009 from the solicitors alleged problems at the asylum interview, the only specific interpretation or correction point made was a quibble about the translation of 'hut' or 'barn' at Question 99. The Immigration Judge was entitled to conclude that there was no justification for the allegation in the letter that the appellant had been "railroaded" in to giving his asylum account at either interview, although it appears the allegation was directed to what he said at the substantive interview. The Immigration Judge rejected the further allegation, as she was entitled to, that the account had been misinterpreted at the screening interview because of malicious intent or linguistic misunderstanding. We add that the solicitor's comment on Question 151 that the appellant suffered from depression, but had said that he had no medical condition because he believed that "he was being asked about [how he felt] during the interview", plainly means that he had felt well during the interview and by necessary implication his capacity and answers had not been affected by the depression now being asserted.

29. The Immigration Judge said this at paragraph 90:

> "I agree with Mr Walker that the many material discrepancies in the Appellant's account have destroyed the core elements of his asylum claim. The Appellant at his screening interview had clearly stated that he joined the military service in August 2008. At his asylum interview he gave a clear and precise date that he commenced his military service on 15th June 2008 and he described two core incidents – that he was stabbed with a bayonet by another soldier and that he was discovered having homosexual intercourse in the communal bathroom with another soldier – both occurred in the second month of his military service in July 2008. He submitted a statement dated 23rd January 2009 alleging language problems with the Home Office interpreter but he did not seek to correct any alleged mistakes in the screening interview record. I agree with Mr Walker that if the Appellant had joined the military service in August 2008, the core incidents of July 2008 described in his asylum interview account could not have happened."

30. The Immigration Judge turned to the explanations which had been offered for the discrepancies: the appellant no longer relied on the allegations of language problems and relied instead on the psychiatric evidence as the explanation for the discrepancies, and not, as his advocate put it, "to increase" the credibility of his account. Mr Walker, the HOPO, had made a number of critical comments about the diagnosis of depression: Professor Prasher gave no indication as to how long his medical examinations had lasted and there was a degree of difference as to the appellant's intelligence between Professor Prasher and Dr Van Woerkom. She noted other differences between the doctors' opinions which she regarded as material.

31. The Immigration Judge referred to the possibility noted by Professor Prasher in his 5 May 2009 report that one of the causes for the way in which the appellant presented, was that he was "malingering", by which it is clear that everyone understood the doctor to mean faking his symptoms. There was no evidence before her that Professor Prasher had engaged in any process of testing the appellant, either in May or on the second examination in June, in order to rule out the possibility of malingering. Dr Van Woerkom in the 15 July 2009 report stated that he did not think that the appellant "could be malingering his symptoms". The Immigration Judge agreed with the HOPO that Dr Van Woerkom "had failed to give clear reasons for coming to this view", and, reading the description of the appellant as "genuinely lethargic" with the next sentence which referred to him having had "a little bit of anti-depressant therapy from his GP", concluded that the doctor "could not rule out the possibility that the appellant was

malingering, or that the "lethargic" presentation could be due to anti-depressants prescribed by his GP".

32. In his second report, Professor Prasher made no mention of malingering, whether it remained a possibility or had been eliminated and if so on what basis. He had only concluded that the symptoms were not due to the effects of medication. His clinical diagnosis was significantly based on the appellant's own description of his symptoms.

33. The Immigration Judge criticised Professor Prasher's opinion, given on 14 July 2009, that the appellant was not fit to give evidence because of his moderately severe depressive illness. It was based on the assessment in the report of 5 May 2009 and Professor Prasher had not seen the appellant since 4 June 2009. She took the view that Professor Prasher's preparedness to give an opinion on 14 July 2009 that the appellant was not fit to give evidence, when he had not seen the appellant for over a month, undermined both the Professor's credibility and his opinion on unfitness to give evidence in the 14 July 2009 report. Indeed, the appellant said in June that he had been feeling a bit better in himself than when he first saw the Professor in May 2009.

34. The Immigration Judge then turned to this report's explanation for the inconsistencies in interviews as being due to depressive illness. She thought it important, in assessing the weight to be given to this opinion of Professor Prasher, that the appellant had in fact blamed the Home Office interpreter for the inconsistencies, alleging that the interpreter had behaved wholly improperly and had maliciously damaged his case. She thought it material that the appellant said he had no medical conditions and only in the 3 February 2009 letter claimed that he suffered from depression. (The letter of 3 February 2009 did not attribute any answers at interview to that depression or assert that it provided the explanation for the inconsistencies, merely correcting the answer to Question 151 about medical condition). She thought that Dr Van Woerkom's opinion about fitness to give evidence contrasted starkly with the opinion of Professor Prasher.

35. She thought that there was a material difference in Dr Van Woerkom's diagnosis of "severe depression" and Professor Prasher's diagnosis of "moderately severe depressive illness." She was dismissive of the evidence of suicide risk, which we have said does not arise for consideration in this appeal before us, and plainly concern about the importance of genuine but unfounded fear is not relevant if the appellant is falsely claiming to be a homosexual. She rejected the claim that the appellant was a homosexual and rejected his asylum account in its entirety.

The appellant's submissions

36. In his submissions for the appellant, Mr Grigg relied strongly on what Mr Justice Langstaff had said in ordering reconsideration. He accepted that the Judge was entitled to reject even uncontradicted expert evidence, but the Immigration Judge had to give adequate reasons for doing so and he submitted that she had not done so for five reasons:

    i. She had assumed that Professor Prasher could perform tests to detect or eliminate malingering, when she had no evidence that such tests existed.

    ii. The Immigration Judge was not entitled to reject the same overall clinical diagnosis of depression, whether severe or moderately severe, because of differences of detail in the diagnoses.

    iii. There were no real reasons for concluding that the appellant was malingering, particularly in the absence of evidence from him.

    iv. It was wrong to treat Professor Prasher's credibility as undermined because he gave a view on 14 July 2009 about fitness to give evidence, having last examined the appellant on 4 June 2009. She did not explain what basis she had for saying in effect that he was unprofessional.

37. Both psychiatrists' reports were based on both the apparent and objective presentation of the appellant.

38. The psychiatric evidence was critical, submitted Mr Grigg, because those who were depressed might not care very much about precise accuracy with dates. It was the discrepancy between the dates the appellant said he joined the army in his screening interview and in his substantive interview, when related to the dates of the key events relied on, that had been a significant plank in the Immigration Judge's rejection of the credibility of the claim. Mr Grigg drew particular attention to paragraph 90 for that submission.

Conclusion

39. We accept that some of the criticisms made of the Immigration Judge's reasoning in relation to the psychiatric reports are sound.

40. She was wrong to treat the difference between the two diagnoses as material when both psychiatrists agreed that the appellant suffered from a depressive illness, and the only difference was whether it was moderately severe or severe. They each examined him and each described similar symptoms and history. That did not mean that she had to accept the diagnosis, but it did mean that she had to provide clear reasons for rejecting it, and that difference between the two psychiatrists could not be a sound reason.

41. Her comment that Dr Van Woerkom could not rule out the possibility that the appellant was malingering does not grapple adequately with the total evidence on malingering, doing justice to the significance of what he does say. He specifically concluded that he was clear that the symptoms were genuine, and said that he did not think that the appellant could be malingering. Although the doctor provides no further reasoning for that view, it is clear that it represents the judgment of a professional psychiatrist on what he can see. This was the key professional evidence on malingering she had to deal with. Saying that he could not rule out the possibility of malingering is not enough and she had to explain what evidence led her to conclude that the appellant clearly was malingering, that is lying about his symptoms and feigning those which the psychiatrists could see. However, the view that Dr Van Woerkom could not rule out the possibility is of itself a statement of the obvious in view of the nature of the issue, and the more so given the absence of any analysis or testing of the appellant's truthfulness, whether by the doctors or by others for them to see. That is not a criticism of the doctors but a recognition that their role inevitably limits the usefulness of their views on whether symptoms are carefully and deliberately feigned.

42. The Immigration Judge may have been too strong in her criticism of Professor Prasher saying that his credibility was undermined because he gave an opinion on fitness to give evidence on 14 July 2009 when he had not seen the appellant since 4 June 2009, and had recognised, at least in relation to capacity that mental state could change. What Professor Prasher had to say on this was very much based on what he found back in May. But she was clearly entitled to reduce very substantially the weight given to his report on that point, unqualified as it was by any reference to the absence of recent examination, and whether or not that could have any impact on the current usefulness of the report. She had the advantage of an up to date report from Dr Van Woerkom which differed in this respect from Professor Prasher, and did so on the basis of current examination, so she knew that the passage of time could make a difference. And she was entitled therefore to regard what else Professor Prasher might say with some scepticism.

43. Her other criticisms of Professor Prasher on this aspect are also not well made: the doctor did not say that there were any tests for malingering that he could have carried out. If there are none, and there is no evidence that there were any he could have used, it is not a proper criticism to say that he had not used them. Of course, if there are no tests, that rather supports her point that Dr Van Woerkom's conclusion on malingering could not rule out the possibility of it.

44. That is not to say however that there were not proper and powerful criticisms which could be made of Professor Prasher's reports: it was Professor Prasher who pointed out that there were three possible explanations, alone or in combination for the symptoms described and seen: medication, malingering, and genuine illness. He took steps to eliminate the first. But he never returned to the second in either report, whether to say that no view could be formed or that he had concluded, and if so why, that the symptoms were or might be genuine or not. That is not satisfactory.

45. But for all that, she had to deal with the report which did express a view, and the fact, which we accept, that the possibility of malingering could not be ruled out, did not prove that it was present. She did reach the view that the appellant was feigning his symptoms but in reaching that view, she had to grapple with what Dr Van Woerkom actually did say, giving proper reasons for rejecting it, even though he did not elaborate the basis for his conclusion on what Professor Prasher had left open.

46. In reality, in our judgment, however the Immigration Judge does explain why she reached that view, although she does not tie her conclusions in with this particular aspect of the evidence. Her reasons are all those which she gives for rejecting the credibility of the appellants' claim: the core events underlying the claim, his departure from Albania and what happened here, in the way his claim evolved, with its effectively abandoned allegations of misconduct by the interpreter, and how the evidence of depression emerged. She drew attention to the interviews; she would have read the detailed nature of the answers, with specific dates being volunteered by the appellant, the scope and extent of what he remembered, and the way in which the reason he gave for the inconsistencies he was questioned about, was not illness but instead allegations against the interpreter, which the Immigration Judge was entitled to find were false. It was not suggested that his depression was capable of explaining the implausibilities in the claim, or his making serious, false allegations about the interpreter. That of itself, and in our view the Judge had this in mind, properly gave rise to grave doubts about the claimed depression: why had he

made those serious and false allegations, and why had he then changed his mind? And a person who made such false allegations would not be above feigning symptoms. They do not appear to be very difficult symptoms to feign, and there is no ready method for judging whether that is what is happening.

47. It was for the Immigration judge to decide whether the appellant was credible, and she would have been in a position to judge this, with the psychiatric reports in mind and with the previous interviews before her. What is more, she had to reach conclusions on the appellant's credibility, knowing that he had failed to turn up for the hearing, at which he had been expected. He had given no explanation for his absence then or before promulgation (and still has not), and had been passed fit to attend, and on 15 July 2009, fit to give evidence albeit with difficulty. (This was a significant change from what he might have thought the position would be at the first hearing and after the further report from Professor Prasher). She was or would have been entitled to draw an adverse inference from his absence. Mr Grigg accepted that were there to be a further hearing, and were the appellant not to attend, the adverse inference could readily be drawn that he was absent because he feared that his evidence would be shown to be false more easily were he to attend. We think that the Judge was or would have been entitled to draw that inference on this occasion.

48. What she is saying in substance, reading the determination as a whole, is that this all provided a proper basis for rejecting the evidence of Dr Van Woerkom on malingering. She does not need to reject Professor Prasher's conclusion on that point because he reached no conclusion on it. If he did so inferentially, he gave no reasons for his view, and if it was simply his professional judgment, the Immigration Judge was entitled to reject it for the reasons which in substance she gave. Her criticisms of the psychiatric evidence are not always well directed but they have to be read in the context of the case as it evolved over time, and some of her points have a kernel of substance.

49. There is a more significant point, which does seriously undermine the confidence to be reposed in their reports which she does not make, but which it is very likely she had in mind. We come to it later. It concerns the absence of analysis by the psychiatrists of either screening or substantive interview. It goes to the very basis of the value of the observations the psychiatrists used for their diagnosis of depression, and supports the rejection of their diagnoses and the fabricating of symptoms by the appellant. We discuss it however in the context of the relevance of depression to the inconsistencies.

50. Even if she or we had accepted the diagnosis of moderately severe or severe depression, the conclusion on the central issue of the credibility of his claim would not be changed. There is no material prospect of a different result on this material. First, the only aspect of his credibility to which the diagnosis was said to be relevant was to provide the explanation for the admitted inconsistencies in his claim. That fails to focus on the real basis for the rejection of his credibility which went far beyond the June/August date for entry into the army. The Immigration Judge's wholesale rejection of credibility draws on the SSHD refusal letter. The structure of the reasoning includes implausibilities as well as inconsistencies, and includes not just what happened in Albania, but how he says he travelled to the UK and what he did here. His tactics in relation to the interpreter undermined both his general credibility, and his later explanation for the role that depression might have played in the inconsistencies. Although dates were an important part of the Judge's reasons, they were not the critical part and certainly not any pin-point inconsistencies in them. The inconsistency related to which month he joined the army, and how long he had been in it when the events occurred, and it was he who volunteered the pin-point accuracy of the 15 June date after all.

51. The psychiatrists' comment on the role of depression in explaining inconsistencies could not and did not even purport to deal with all the aspects of the claim which the Immigration Judge found incredible.

52. Second, the view that depression, even to the lower standard of proof, could provide a reasonable alternative explanation for the inconsistencies is in the end also untenable, as in reality the Judge found. It is not obvious why depression should mean that positive answers should be inconsistent, unless they were accompanied by reservations about their accuracy, which they were not, or were answered in some sequence which suggested difficulties in remembering dates, which they were not.

53. The manner of answer in examination was crucial to the psychiatrists' view that depression played a part in inconsistencies. We acknowledge that Dr Van Woerkom is much the more circumspect. Yet the psychiatrists had either not read the interview records, statement and letters or had not evaluated them in reaching their conclusions. This obviously means their views are not informed by crucial information available to the Immigration Judge and to this Tribunal. Neither records are consistent with what the psychiatrists describe in their examinations, even though the manner of speaking is not recorded. The sequence of questions and answers, the detail of events and people is clear, and in obvious contrast to how the psychiatrists portray the appellant on examination. He volunteered

specific dates: there is no obvious difficulty with remembering events and details, including personal and family details. There was no suggestion by either that what they saw on examination was a condition which had only arisen after the interviews, upon which, with the aid of solicitors, the appellant had commented in statement and letter. They read as normal interviews, although pauses are not recorded, and there are some passages where there might be some crossed wires. There is no evidence from him or anyone about his demeanour at those interviews. Nothing is noted by either interviewer or the interpreter.

54. The solicitors provided no material to suggest that they had had any difficulty in taking instructions or preparing the statement after the screening interview, or in writing the letter after the substantive interview. Neither statement nor letter suggests any difficulty on the appellant's part at all in remembering either the events described at interview or the interviews themselves. The purpose was to correct answers, which suggest that he remembered events quite clearly, the answers given, and what he thought was wrong with them. The first explanation for inconsistency was the malice of the interpreter which was withdrawn after some time. When depression was first raised it was not to explain inconsistency, but just to correct the omission by the appellant to say that he was depressed. None of this is mentioned or evaluated by Professor Prasher or Dr Van Woerkom. We would not have thought it possible to give any weight to their views on inconsistency being caused by depression.

55. Accordingly, if there were any error of law in what the Immigration Judge concluded in relation to the diagnosis, and we would have reached the same view as she did, using substantially the same reasoning, the error had no effect on the result. Taking the diagnosis as correct, it provides no reasonable explanation for the many aspects of the appellant's evidence and behaviour which led to the rejection of his claim as credible.

56. This appeal is dismissed.

Signed

Mr Justice Ouseley
(sitting as a Judge of the Upper Tribunal)