IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001600
First-tier Tribunal No:
PA/51440/2020
IA/00816/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 10th November 2022

Decision & Reasons Promulgated
On the 06 February 2023

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'MAK'
(ANONYMITY DIRECTION CONTINUED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Representation:
For the Appellant: The appellant did not attend and was not represented.
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 10th November 2022.

2. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of his human rights claim.

3. The background to this appeal is set out in my error of law decision, which is annexed to these reasons. Very broadly speaking, the appellant claimed to have a well-founded fear of persecution in his country of origin, Pakistan, based on a claim, which the FtT found to be not genuine, but he is gay. I preserved that finding. The second issue was whether his return would also breach his rights under articles 2, 3 and 8 of the ECHR, as a result of his acknowledged mental health issues. I had found that the FtT had erred in law because she had failed to consider and apply the updated authority of AM (Zimbabwe) v SSHD [2020] UKSC 17. However, I also preserved finding that the appellant would have family support on return to Pakistan (§49 of the annexed decision).

The issues in this appeal

4. The issues in remaking the FtT's decision, on the core issue (Article 3) are, as per: AM (Art 3; health cases) Zimbabwe [2022] UKUT 00131 (IAC):

    4.1 first, had the appellant discharged the burden of establishing that he was or is a "seriously ill person"?

    4.2 Second, if he had, has the appellant produced evidence "capable of demonstrating" that "substantial grounds had been shown for believing" that as a "seriously ill person", he would face a "real risk" on account of the absence of appropriate treatment in Pakistan or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his state of health, resulting in intense suffering, or to a significant reduction in life expectancy?

5. In respect of Article 8, I considered sections 117A and B of the Nationality, Immigration and Asylum Act 2002 and the well-known five-stage test in Razgar v SSHD [2004] UKHL 27, which I do not recite in full.

6. In respect of the appellant's rights under Article 2, I bore in mind the lower evidential standard of whether there are substantial grounds for believing that, as a result of the respondent's decision, that the appellant will be exposed to a real risk of death. As the protection claim has already been dismissed, this could only relate to the risk as a result of the appellant's mental health issues.

The Hearing

The appellant's non-attendance

7. On a preliminary point, the appellant has not attended this hearing. I considered whether to proceed in his absence, in the context of the

overriding objective, which required me to deal with the case justly and fairly. I considered not only whether the appellant had demonstrated a good reason for postponing the hearing, but also whether the appellant was deprived of a fair hearing. I was conscious of the cases of SH (Afghanistan) v SSHD [2011] EWCA Civ 1284 and Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC).

8. There is relevant procedural history. I had previously decided that the FtT had erred in law in my decision of 18th May 2022. I retained remaking in the Upper Tribunal and issued directions requiring the appellant or his representatives to file and serve a consolidated, indexed and paginated bundle containing all of the updated evidence on which he intended to rely, including any updated medical evidence and GP records and a witness statement (see §51.2 of the annexed error of law decision). A resumed hearing was listed for 2nd August 2022. A representative of the respondent, Ms Cunha attended. No one on behalf of the appellant attended. As I recorded in my adjournment decision, I directed that the appellant's solicitor, with conduct of the appellant's appeal, should explain their reasons and that there would be a telephone case management review hearing.

9. In response to my directions, I then received a witness statement from the instructed solicitor, a Mr Shoaib of Briton Solicitors, dated 16th August 2022. He confirmed that he had contacted the appellant to book an appointment to discuss the matter further, after my error of law decision. Following on from that, the barrister agreed that the appellant needed to prove, and provide proof of, his medical condition, or that he could make further submissions and withdraw the appeal. Mr Shoaib explained the directions to the appellant and his friend in detail, questioned the appellant on his medical condition and discussed his opinion as to the response. The barrister was booked to attend on 2nd August 2022 and they awaited final instructions from the appellant. The appellant's final instructions were that he wished Mr Shoaib to withdraw from the matter, but that he should not discontinue the appeal, and the appellant may or may not attend the hearing but he would still wait for the final decision of the Upper Tribunal. The appellant agreed to send medical evidence for filing and service, before Mr Shoaib withdrew. In light of those instructions, Mr Shoaib notified the barrister that they no longer had instructions to represent the appellant. Mr Shoaib awaited medical records, as agreed, but received nothing from the appellant. Mr Shoaib attempted on several occasions to contact the appellant about his medical evidence and whether he would be attending, in order to update the Tribunal accordingly. All efforts proved unsuccessful. The appellant did not pick up or return the telephone calls. When Mr Shoaib realised that the appellant was not likely to respond further, he notified the Upper Tribunal on 26th July 2022, seven days before the hearing. In doing so, it appears that he sent the notice of ceasing to act to an incorrect email address, but I accept that Mr Shoaib's attempt to communicate was genuine.

10. What is clear, is that the appellant, on legal advice, is aware of the importance and need to adduce any evidence on which he seeks to rely, but indicated that he may or may not attend the hearing.

11. The case was then listed for a further telephone case management hearing on 29th September 2022, to give the appellant the opportunity to attend. Notice of that hearing was sent to the appellant personally. Once again, the appellant did not attend the telephone case management hearing and there was no explanation for his non-attendance. I directed therefore that he be sent a notice of this hearing to the last known postal address, to which he had also referred as his address in his witness statement. I am satisfied that the appellant has been given every opportunity to participate in these hearings and, it appears, is simply content to wait for this Tribunal's decision. I am satisfied, in the circumstances, that it is in accordance with the overriding objective that I proceed with the hearing.

The respondent's submissions

12. I turn now to the substance of the appeal. I do not recite the law, which is settled, but summarise the gist of Ms Nolan's concise, but relevant submissions.

13. Turning to the legal issues that I have identified, she urged me to consider that the appellant has not discharged the burden of establishing that he is a seriously ill person, or in the alternative there was no evidence capable of demonstrating substantial grounds for believing that as a seriously ill person, he would face a relevant risk in Pakistan. He has family in Pakistan and the relevant Country Policy and Information Note or 'CPIN' refers to the availability of medical services in Pakistan (see version 2.0 for September 2020, §4.12.1 and §4.12.2,). There were eleven psychiatric hospitals and over 500 inpatient or residential facilities and was no reason why the appellant could not receive such treatment or have access to it.

14. The evidence of the previous medical expert, Mr Smyth, had flaws and was of some age, dated 26th February 2021. It had not been updated. In terms of its flaws, it had not referred to a previous determination of Judge Courtney, and Judge Courtney's concerns around the appellant's credibility and findings as to whether he was or was not gay. Much of the subsequent assessment was predicated on the assumption that the appellant feared persecution on return, see internal pages [17] and [23] of the report. Also, and bearing in mind the authority of HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC) and bearing in mind headnote (5), which stressed the importance of GP records, there was no indication that Mr Smyth had obtained up-to-date GP records. There had been no consideration, bearing in mind the concerns about malingering, that Mr Smyth had considered the possibility of malingering. This was despite the assessment at internal page [20] of major symptoms consistent with psychotic symptoms. At internal pages [29] and [30], Mr Smyth had set out a detailed plan to mitigate the appellant's mental health symptoms. There was no evidence about whether the appellant

had engaged with that plan. The risks identified by Mr Smyth at internal page [27] as to the appellant being bewildered and confused in detention, were clearly superseded in circumstances where he as no longer in detention. Mr Smyth had assessed the appellant's condition based on threats to his life, which Judge Courtney had found not to be genuine, let alone well-founded.

15. In the circumstances, Ms Nolan invited me to consider that the appellant has not discharged the burden that he is seriously ill. If I were to not accept that submission, in the alternative, there were no substantial grounds for the relevant real risk. Crucially he has family support in Pakistan and access to medical treatment.

Discussion

16. I bear in mind that the burden of proof on the appellant, to the lower standard under articles 2 and 3, or the balance of probabilities under article 8. First, there is no updated evidence from that provided in February 2021, which must call into question whether the appellant has discharged either of the evidential burdens. Second, I accept Ms Nolan's criticisms of Mr Smyth's report, in particular. An assessment of the seriousness of the appellant's condition, was apparently reached without detailed analysis of GP records in circumstances where HA (expert evidence), identifies the risks around that. There is also a lack of lack of discussion, in any detail, of the risk of malingering. This is further relevant where part of the assessment was based on so-called 'PHQ-9' and' GAD-7' tests, undertaken by the appellant, in relation to which concerns have been raised by this Tribunal as to their diagnostic efficacy (see paragraph [139] of HA (expert evidence)). In the circumstances, I was invited by Ms Nolan to attach significantly less weight to the report. Notwithstanding Mr Smyth's expertise, I am satisfied that the report has substantial weaknesses and I attach more limited weight to it, despite the potentially serious conditions identified in that report. I also accept Ms Nolan's submission that there is no updated medical evidence, despite the appellant being given multiple opportunities to provide it.

17. I find that the appellant has not demonstrated that he is a seriously ill person for the purposes of the first limb of AM (Zimbabwe). Second, and in the alternative, even had I found that the appellant was still a seriously ill person, there is no discussion in Mr Smyth's report of how ongoing family support from Pakistan, together with access to medical facilities in Pakistan, would substantially mitigate that risk, particularly where the test is one of serious, rapid and irreversible decline. In the circumstances, the Article 3 claim fails.

18. I am also satisfied that there is not evidence that demonstrates, to the lower standard, that as a result of the appellant's health issues, refusal of leave to remain would risk breaching his rights under article 2.

19. I have separately considered the article 8 claim in respect of the appellant's private life, by reference to the appellant's mental health

issues and whether that they present very significant obstacles to the appellant's integration into Pakistan, or more widely under article 8, renders the refusal of leave to remain disproportionate. Once again, the evidence is simply lacking. There is nothing beyond the question of the appellant's mental ill-health other than his period of residence, albeit now as an overstayer in the UK, which he has adduced to show that there would be any obstacles to his return to Pakistan. He has family to support him there and his fear of persecution is not genuine, let alone well-founded.

20. I have not heard any evidence of family life in the UK and there is no indication that family life is engaged in respect of article 8. His claims to be in relationships with male partners have been rejected.

21. In the circumstances I have no hesitation in concluding that, by reference to section 117B of the Nationality, Immigration and Asylum Act 2002, and the little (but not no weight) to be attached to the appellant's private life, given his overstaying, refusal of leave to remain is overwhelmingly in the public interest. The article 8 claim also fails and is dismissed.

Conclusion

22. On the facts established in this appeal, there are not grounds for believing that the appellant's removal from the UK would result in a breach of the appellant's rights under Articles 2, 3 and 8 of the ECHR.

Decision

23. The appellant's appeal on human rights grounds is dismissed.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **25th November 2022**

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: PA/51440/2020
& UI-2021-001539

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th May 2022	**On**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'MAK'
(ANONYMITY DIRECTION CONTINUED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Representation:
For the appellant: Ms A Jones, Counsel, instructed by Briton Solicitors
For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 9th May 2022.

2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Beg ('the 'FtT'), dated 14th December 2021, by which she dismissed his appeal against the respondent's refusal on 13th November 2019 of his fresh protection and human rights claims.

3. In essence, the appellant's claims involved the following issues: first, whether the appellant had a well-founded fear of persecution in his country of origin, Pakistan, on the basis that he was a gay man, and whether, as a result, his return would also breach his rights under Articles 3 and 8 of the European Convention on Human Rights ('ECHR'); and second, whether his acknowledged mental health issues would also result in his return breaching his rights under Articles 2, 3 & 8 in respect to his right to respect for his private life.

4. In refusing the appellant's fresh claims, the respondent considered the appellant's immigration history. He had applied on 11th January 2007 for entry clearance as student, which had been refused and his appeal was dismissed. He was later granted a student visa on 8th February 2011, valid until 31st May 2014 but this was revoked in June 2013. In May 2014 he applied for leave to remain as a Tier 1 Entrepreneur, which was refused. His appeal to the First-tier Tribunal was dismissed and his application for permission to appeal to the Upper Tribunal was refused in October 2015, after which his appeal rights were exhausted.

5. The appellant claimed asylum for the first time on 23rd November 2015. The respondent refused his application on 11th May 2016. His appeal was dismissed by the First-tier Tribunal (Judge Courtney) in a decision promulgated on 5th September 2016. Permission to appeal to the Upper Tribunal was refused and his appeal rights were exhausted on 12th December 2016. He then made further submissions in March and April 2019, both of which were refused and he then made final further submissions on 2nd September 2019, which the respondent treated as a fresh claim and considered in the impugned decision.

6. The respondent considered the appellant's claim to be in a relationship since September 2018 with a male partner. He claimed to live openly in the UK as a gay man and on his return to Pakistan, would be at risk of harm from family members. That risk would not be mitigated by internal relocation, and he would not have sufficient protection from adverse attention. His mental health issues would worsen if he were returned to Pakistan.

7. The respondent referred to the well-known authority of Devaseelan v SSHD [2002] UKIAT 00702 and noted Judge Courtney's previous adverse findings on the appellant's credibility, particularly in relation to the appellant's delay in claiming asylum, after multiple other rejected applications. Judge Courtney had also been critical of the vagueness of the appellant's

answers to questions in his asylum interview as well as the likelihood that he was able to watch international channels, showing gay people, in Pakistan. The appellant had also been inconsistent about whether his family were aware that he was gay, claiming in his asylum support statement of October 2015 that they were not aware and he had not told them because he needed their financial support, but only a matter of months later claiming that they had threatened him eight or nine months previously, before his October statement, because he was gay. Judge Courtney also regarded the appellant as inconsistent about when a long-standing friend, who had allegedly told the appellant's parents of his sexuality, had been present in the UK, and when that friend was aware that the appellant lived as an openly gay man. Judge Courtney also regarded as implausible that the friend, whom the appellant had not known in Pakistan before coming to the UK, would telephone the appellant's parents, many years after becoming aware of the appellant's sexuality. Judge Courtney had also noted the appellant's claimed partner's absence at the Tribunal hearing, to give evidence in support of the appellant.

8. The respondent accepted that gay men formed a particular social group in Pakistan, as per the Country Information and Guidance Note of July 2019. The respondent accepted that if the appellant were genuinely and openly gay, he could not expect sufficiency of protection, nor was internal relocation viable.

9. The respondent considered a further statement from the claimed partner of the appellant in support, as well as undated and unlabelled photographs. The respondent did not regard it is determinative that the appellant may have cohabited with a gay man or had attended Pride events in the UK. The correspondence provided did not refer to both the appellant and his claimed partner at a common address and there were also inconsistencies about the appellant's claimed address.

10. Moreover, whilst the appellant had also provided evidence of having had STD and HIV tests, that similarly was not determinative.

11. The appellant has produced no further evidence since Judge Courtney's decision that his family had become aware that he was gay and had threatened him.

12. The respondent also considered scarring evidence, said to relate to being beaten with sticks, rods, being kicked, punched, and having his hands and feet bound. The appellant had failed to explain why he had never mentioned these injuries previously, despite them being said to relate to a land dispute, which the respondent had previously considered.

13. The respondent considered the appellant's ill health. The respondent concluded that the medication which the appellant was taking for his depression and anxiety was available in Pakistan. The appellant's ill health was not at a critical stage and his return would not breach his rights under Articles 3 or 8 ECHR.

The FtT's decision

14. The FtT referred correctly to the lower standard of proof (§24). She then went on to consider the "Devaseelan" principles at §25 and took the decision of Judge Courtney as her starting point. She went on to consider the new evidence, specifically the report of a consultant psychologist at §30. At §34, the FtT accepted it was one relevant part of the evidence but that it remained for the Tribunal to determine whether the appellant was being truthful about his claim to be gay. At §39, the FtT noted that the medical expert had provided an assessment based on the appellant's claimed fear of persecution. The FtT accepted that the appellant suffered from major recurrent depression and generalised anxiety disorder (§40) but found that this was caused by the uncertainty with which the appellant had lived for several years regarding his immigration status.

15. The FtT went on to consider the contradictory evidence regarding the appellant's claimed address which he shared with a partner, for example medical records which had referred to him having no fixed abode whereas he was claiming to be living with his partner at the time. Even though there was evidence of correspondence separately identifying the appellant and his partner as living at the same address, they had been friends for some time, and this contrasted with the appellant's inability to remember his partner's full name (§42).

16. The FtT specifically considered that the appellant had a poor memory and accepted that the appellant was a vulnerable adult, (§44), referring to the Joint Presidential Guidance Note, No. 2 of 2010. However, the FtT concluded that the appellant's poor memory did not adequately explain his inability to remember the name of the partner with whom the appellant claimed to be living for a significant period of time and with whom he was in a relationship, which was central to his appeal. There was no specialist medical evidence, other than the reference by the expert, as to the extent of the appellant's memory loss and inability to remember names. There was no medical report stating that he was unfit to give evidence. He had been able to remember the names of other previous witnesses, who had failed to attend earlier hearing.

17. The appellant's witness, 'MRM' had also struggled to name of the appellant's former partner or confirm when the appellant's relationship with his partner had started, or how long their period of cohabitation had lasted (§§45 to 47).

18. The FtT also considered witness evidence of 'SHS,' whom the FtT considered had very little knowledge about the appellant and no direct knowledge of his sexual orientation (§48).

19. The FtT went on to consider that the fact of the appellant taking HIV/SDT tests was not cogent evidence of sexual orientation. Photographs of the appellant attending Pride events and clubs were also of limited evidential weight (§§49 to 50).

20. The FtT considered in detail Judge Courtney's findings on credibility, and in particular, what she had regarded as the numerous inconsistencies in the appellant's account.

21. The FtT then considered the appellant's medical records and 'Rule 35' report (a short form medical report prepared while the appellant was in immigration detention under Rule 35 of the Detention Centre Rules 2001) in relation to scarring (§58).

22. The FtT also noted that the appellant's account of being attacked in Pakistan, as being unrelated to the appellant's sexual orientation, instead relating to a land dispute.

23. Taking the evidence as a whole, the FtT did not accept that the appellant was a gay man or that his family believed him to be gay. The FtT concluded that the appellant's claim was fabricated after he had exhausted all other appeal rights (§60).

24. The FtT concluded at §§63 to 65 that the appellant would be able to integrate into Pakistan as an insider (see the well-known authority of SSHD v Kamara [2016] EWCA Civ 813).

25. The FtT also considered the appellant's claim under Article 3 at §68 and at §73 concluded that there was no reliable evidence of the risk of suicide. The medical notes did not indicate a risk of suicide or an attempt by him. The appellant had the capacity to form and enjoy relationships. He had a number of friends, two of whom had supported him in the hearing. He had been capable of working and studying in the UK. He could be treated for his mental illness in Pakistan. He was not presently receiving counselling in the UK. He would have a home to return to in Pakistan, with the support of his family members.

26. Having considered the evidence as a whole, the FtT rejected the appellant's appeal.

The grounds of appeal and grant of permission

27. The appellant lodged grounds of appeal, the gist of which is as follows:

    27.1. Ground (1) - the FtT had erred in law by not considering the witness and other evidence which should have sufficed to discharge the burden of proof to the lower evidential standard. When I explored with Ms Jones whether this ground was simply a perversity challenge, she indicated that it was wider. The FtT did not expressly consider (or refer to) the fact that the appellant's claimed former partner had been granted refugee status on the basis of being gay and had not considered the wider evidence as a whole.

    27.2. Ground (2) - the FtT had misdirected herself by considering credibility as a 'memory test' when at §42 she had commented that the appellant could not remember the full name of his former partner, even though he was suffering from recurrent depression and generalised anxiety disorder.

27.3. Ground (3) - the FtT had failed to attach sufficient weight to the expert medical evidence of Mr Smyth, which corroborated the appellant's claim to be gay and the genuineness of his fear of persecution.

27.4. Ground (4) - the FtT had erred in concluding at §42 that cohabitation with a gay man, who was recognised as a refugee, was not sufficient to discharge the evidential burden, when combined with the other evidence.

27.5. Ground (5) - the FtT had failed to apply the authority of AM (Zimbabwe) v SSHD [2020] UKSC 17 when she considered Article 3 ECHR, at §§68 to 69.

27.6. Ground (6) - the FtT had failed to consider the appellant's overall circumstances when considering very significant obstacles to his integration in Pakistan.

28. First-tier Tribunal Judge Connal granted permission on 10th February 2022. The grant of permission was not limited in its scope.

The hearing before me

29. The representatives' submissions were focussed, relevant and pragmatic, and assisted me in reaching a decision.

The appellant's submissions

30. Ms Jones did not pursue ground (6). She pragmatically accepted that the case stood or fell on whether the appellant was found to be a gay man, or in the alternative or in addition, his return risked his suicide or relevant decline in his mental ill-health. She indicated that the two issues were separable, so that the appellant might still succeed, even if he were not found to be a gay man.

31. In relation to grounds (1) to (3), Mr Smyth, the medical expert, had specifically referred in his report to the appellant suffering from anxiety and panic attacks, which affected his memory. The evidence, as the FtT noted at §33, had included that when the appellant was in detention, he had become bewildered and confused. The FtT had accepted that the appellant suffered from major recurrent depression and generalised anxiety disorder. However, she had failed to link this to a possible explanation for why the appellant could not recall his former partner's full name. He also could not remember the name of a witness who had attended an earlier hearing, whose attendance was undisputed, so his memory was poor even for uncontested events. While the FtT had referred to other witnesses at §46 onwards, the FtT had not referred to (and by implication considered) that the appellant's claimed former partner had been recognised as a refugee, because he was gay man. (Ms Jones clarified that the recognition was not on the basis that he was in a relationship with the appellant, as he had been recognised as a refugee before their relationship had begun).

32. In relation to the Article 3 claim on the basis of the appellant's mental ill-health, the cases cited by the FtT at §§68 to 69 were relatively "ancient,"

pre-dated AM (Zimbabwe) and meant that it was not safe to assume that the FtT had correctly considered the evidence and applied the law, as currently understood, to her findings.

33. Ms Jones also submitted that it was unclear what the FtT had found in relation to the reliability of Mr Smyth's expert evidence. The FtT had stated at §73:

> "I find that there is no reliable evidence of a risk of suicide. Whilst the appellant said in evidence that he thinks he should die, his medical notes do not indicate a risk of suicide or an attempt of suicide by him. I find that the appellant has the capacity to form and enjoy relationships. He has a number of friends, two of whom gave evidence at the appeal hearing…."

34. §73 then continued with a discussion of a number of factors which the FtT viewed as mitigating the risk of a deterioration in the appellant's mental ill health. Reading §73 as a whole, it was unclear whether the FtT had accepted the expert medical evidence as to the seriousness of the appellant's ill health, in particular the consequences of that for the risk of suicide, and if so, whether that risk was mitigated. The reader was being asked to make a leap to infer that there was no such risk, or if there were, it was mitigated, when the FtT had failed to engage with the expert evidence on that point and had failed to refer to up-to-date case law.

The respondent's submissions

35. Mr Whitwell first pointed to the FtT's detailed analysis. Referring next to ground (1), either on the basis of perversity or that the FtT had failed to consider specific relevant evidence, Mr Whitwell argued that much, if not all of the evidence referred to in the grounds of appeal had been mentioned by the FtT. She had referred to the appellant's witness statement and those of his two witnesses at §§41, 46 and 48; and correspondence from the "Naz" organisation in relation to STD tests at §49. She had not specifically cited correspondence from the appellant's NHS Trust of 27th December 2019 but had referred to medical evidence in more general terms, at §58. The FtT had referred to the appellant's attendance at Pride events at §50, as well as to photographs and WhatsApp messages. The FtT had referred to the oral witness evidence of the appellant and his two witnesses at §§41 and 46, and had cited Mr Smyth's expert medical evidence at §§30, 32 and 40. His response to the perversity challenge was that given Judge Courtney's earlier assessment of the appellant's credibility as the starting point, the FtT's subsequent decision, even in light of the new evidence, did not come close to being perverse.

36. In relation to ground (2) and whether the FtT had impermissibly applied a "memory" test, there was no link in Mr Smyth's report between the appellant's depression and an inability to give consistent evidence. Internal [21] of the report had discussed "Mood and Affect," which referred to the appellant's memory suffering, but the sections on "impression/opinion" (internal [23]) and "risk/prognosis" (internal [27]) did not develop the analysis of poor memory any further. The FtT had accepted Mr Smyth's prognosis but did not accept the link between the

appellant's memory suffering and his poor credibility, for a variety of reasons. The FtT was entitled to make that finding on the evidence before her and there was no error of law.

37. In relation to ground (3), the weight to be attached to Dr Smyth' report was manifestly a matter for the FtT, as she had made clear at §§34 and 39. The appellant's challenge also ignored other reasons for the FtT's adverse findings on credibility, including, but by no means limited to, inconsistent evidence on how long the appellant had lived with his partner. The FtT has also assessed the two witnesses and was entitled to attach limited weight to their evidence. The FtT had clearly considered the evidence as a whole, including cohabitation with a gay man (ground 4) and the challenge was effectively a disagreement on the weight to be attached to particular aspects of the evidence, rather than any error of law.

38. In relation to the Article 3 appeal (ground (5), Mr Whitwell began by suggesting the FtT may have been citing older authorities in the context of Article 8, rather than Article 3, at §§69 to 70, but was unable to develop this submission in light of the FtT's clear dismissal of the appeal on grounds of Articles 3 and 8. Nevertheless, he urged me to consider that the FtT had clearly found there to be no reliable evidence of a risk of suicide. Even had the FtT referred to AM (Zimbabwe), this was not a case where on the factual circumstances, it would have made any difference and the appeal would have succeeded.

Discussion and conclusions

Grounds (1) and (4)

39. In relation to ground (1) I accept Mr Whitwell's submission that the FtT considered all of the evidence in the round when considering the appellant's asylum claim. I accept Ms Jones's point that the FtT did not refer to the appellant's former partner being recognised as a refugee because he was gay, but the FtT clearly referred to his having refugee status (§16), relevant to ground (4). As Mr Whitwell further submitted, the FtT confirmed at §24 that she had considered all of the evidence in the file. I accept the force of his submission that the FtT did not need to recite every aspect of the evidence in full. The FtT had recited other aspects of the evidence in detail, as referred to in the points identified by Mr Whitwell. I further accept Mr Whitwell's submission that the FtT engaged with the evidence as a whole; that her reasoning was perfectly adequate; and that any challenge on the basis of perversity did not come close to succeeding.

40. Grounds (1) and (4) disclose no error of law.

Ground (2)

41. In relation to the alleged application of a "memory test", I accept Mr Whitwell's submission that while Mr Smyth had referred to the appellant's memory suffering, the FtT had specifically considered whether this might explain the appellant's inability to recall his alleged partner's full name,

whom he claimed to live with for a significant period and where the relationship was the focus of the appeal. The FtT had expressly reminded herself of the Presidential Guidance Note No 2 of 2010. Nevertheless, the FtT was entitled to reach the conclusion she did, namely that the explanation was not satisfactory. That was a conclusion open to the FtT to reach on the evidence as a whole and did not amount to an error of law.

Ground (3)

42. The weight to be attached to Mr Smyth's medical report was a nuanced one, in the context of the evidence as a whole, as the FtT reflect. Mr Smyth confirmed the consistency of the appellant's fear as relating to his sexuality, but the FtT was entitled to consider the report as one aspect of the evidence, along with other aspects such as the internal consistency of the appellant's narrative: the correspondence and other evidence from his supporters; but also the starting point of Judge Courtney's findings. I do not accept that the FtT discounted Mr Smyth's report impermissibly. She considered that the appellant's mental ill-health could also be explained because of his precarious immigration status. That was a conclusion open to the FtT and discloses no error of law.

Ground (5)

43. This is the one ground where I accept the force of Ms Jones's submissions. The FtT's decision, however detailed and well-structured, was unsafe in relation to the reasoning on Article 3 ECHR, such that it cannot stand in relation to this one issue. At §§68 to 71, the FtT cited the cases of GS and EO (Article 3 - health cases) India [2012] UKUT 00397 ; GS (India) [2015] EWCA Civ 40; and ES (Tanzania) v SSHD [2009] EWCA Civ 1353, as authority for a number of propositions, including that even if someone's life would be drastically shortened by the progress of natural disease if they were removed to their home state, that would not breach Article 3.

44. As I explored with Mr Whitwell, key was whether the FtT had adequately analysed and explained her findings on two issues: first, had the appellant discharged the burden of establishing that he was a serious ill person? Second, if he had, had the appellant produced evidence capable of demonstrating that substantial grounds had been shown for believing that as a seriously ill person, he would face a real risk on account of the absence of appropriate treatment in Pakistan or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his state of health, resulting in intense suffering, or to a significant reduction in life expectancy?

45. Even if the FtT had not formulated the legal test in precisely those terms, I nevertheless considering whether it was clear from the FtT's findings or analysis that she had born these questions in mind. The example which shows the gap in her analysis is in relation to the FtT's finding at §73 that there "is no reliable evidence of a risk of suicide" The difficulty is that Mr Smyth indicated that there was precisely such a risk, at internal [29], when

he stated: "[MAK] has Active Suicidal Intent and his previous history coupled with his current mental confusion and Extreme Depressive and Anxiety Disorders, places him at Serious Risk of self-harm or suicide". It was, of course, open to the FtT to explain why she did not accept that risk or Mr Smyth's prognosis, but she did not do so. Mr Whitwell urged me to consider that the FtT was required not to consider the medical evidence in isolation, and that Mr Smyth assessed the appellant based on a narrative of feared persecution as a gay man. That may be correct, and I accept that the FtT was entitled to conclude that the appellant had not proven that he was a gay man, but the FtT also accepted the prognosis that the appellant was suffering from a general anxiety disorder and major recurrent depression. In that context, I accept Ms Jones's point that it is unclear whether the seriousness of the appellant's medical conditions was accepted; or whether the FtT's analysis was focussed instead on mitigating factors such as the availability of medical treatment and the support of family and friends. The FtT did not engage with, or explain adequately, how she reached her conclusion on suicide risk, in the context of Mr Smyth's prognosis.

46. The flaw in the analysis is limited to the assessment under Article 3, and is separable from, and did not affect, the FtT's conclusion that the appellant had not proven that he was a gay man. The same flaw does, however, inevitably, have a bearing on obstacles to the appellant's integration in Pakistan, so that the conclusion on Article 8 is also unsafe.

47. In reaching these conclusions on whether the FtT erred in law, I preserve her findings that the appellant has not shown, to the lower standard, that he is a gay man, or that he fears persecution on that basis; and also, her findings that the appellant will have support from family members, were he to return to Pakistan. However, there will need to be a further consideration of the evidence in relation to the appellant's mental health issues and the extent to which the appellant's rights under Articles 3 or 8 risk being breached, in the event that the appellant is refused leave and must return to Pakistan.

Decision on error of law

48. The FtT did not err in her conclusions in relation to the appellant's claim to be gay, or to fear persecution on that basis. Those conclusions stand and that aspect of the appeal is dismissed.

49. The FtT did err in her conclusions in relation to Articles 3 and 8 in relation to the appellant's ill-health, which are unsafe and cannot stand. However, I preserve the FtT's findings that he would have family support on return to Pakistan.

Disposal

50. With reference to §7.2 of the Senior President's Practice Statement and the limited scope of the remaining issues, it is appropriate that the Upper Tribunal remakes the part of the FtT's decision which has been set aside.

Directions

51. The following directions shall apply to the future conduct of this appeal:

51.1. The Resumed Hearing will be listed for the first available date **after 1st August 2022** at Field House, time estimate 3 hours, with an Urdu interpreter, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal. The appellant is not obliged to give evidence, although it remains for a remaking Judge to decide what impact, if any, the lack of live evidence has on the appellant's outstanding appeal.

51.2. The appellant shall no later than 4pm, **14 days before the Resumed Hearing**, file with the Upper Tribunal and served upon the respondent's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely, including any updated expert medical evidence and GP records. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.

51.3. The respondent shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the appellant's evidence; provided the same is filed no later than 4pm, **7 days before the Resumed Hearing**.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law in respect of the appellant's claims in relation to articles 3 and 8 ECHR, so far as they related to his ill-health.

All of the other grounds of appeal are dismissed. The FtT's findings that the appellant has not proven that he is gay or fears persecution on that basis, and her finding that he has family support in Pakistan, are preserved.

The Upper Tribunal will remake the outstanding appeal.

The anonymity directions continue to apply.

Signed J Keith Date: 18th May 2022

Upper Tribunal Judge Keith