IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001878
First-tier Tribunal No: PA/01559/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 January 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

S V
(ANONYMITY ORDER MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr V P Lingajothy, of Duncan Ellis Solicitors.
For the respondent: Mr D. Lindsay, Senior Presenting Officer.

Heard at Field House on 19 December 2022

Anonymity
I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify her. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings. I make this order because this is a protection claim. The parties at liberty to apply to discharge this order, with reasons.

Decision

1. The appellant, a national of India born on 25 June 1988, appeals against a decision of Judge of the First-tier Tribunal Moffatt (hereafter the "judge") who, in a decision promulgated on 4 November 2021 following a hearing on 1 October 2021, dismissed her appeal on asylum grounds, humanitarian protection grounds and human rights grounds against a decision of the respondent dated 4 February 2020 to refuse her protection claim of 14 January 2019.

2. At para 72 of her decision, the judge said that the appellant's Article 8 claim was not pursued before her. The grounds do not challenge para 72 of the judge's decision or her decision to dismiss the appeal on human rights grounds with reference to her Article 8 claim.

3. In reliance upon a psychiatric report from Dr Dhumad dated 14 November 2020, the appellant did not give oral evidence before the judge.

4. At para 56 of her decision, the judge said that the case hinged upon the appellant's credibility. At para 67, the judge said that, "*having considered all of the evidence in the round*" and for the reasons she had given earlier, this was a case "*where the appellant's credibility [was] completely undermined*". She found that the appellant was not detained as claimed in 2010 and that consequently she had not been subjected to torture or sexual assault whilst in detention; that the appellant did not go into hiding in 2011 or, alternatively, detained until 2014; and that there was no period of detention in 2015.

5. The grounds, in summary, contend that the judge erred in law as follows:

   (i) (Ground 1) The judge's treatment of the psychiatric report was unreasonable, in that, it appeared that she rejected the medical opinion, that the appellant was suffering from *"sever [sic] depressive episode with symptoms of PTSD typical of the psychological reaction to the ill-treatments the appellant received in India*" based *"not upon other medical evidence or submissions made by the respondent but [her] own non-medical preconception"*.

   (ii) (Ground 2) In assessing the appellant's evidence and overall credibility the judge erred by failing to apply the *Joint Presidential Guidance Note No 2 of 20201: Child, vulnerable adult and sensitive appellant guidance* (hereafter the "Presidential Guidance"). She failed to address or seemingly consider the extent of the appellant's vulnerability, the effect on the quality of the evidence and the weight to be placed on the vulnerability in assessing the evidence.

   (iii) (Ground 3) The judge failed to consider the medical evidence as an integral part of her findings on credibility and she therefore erred as explained in Mibanga v SSHD [2005] EWCA Civ 367.

6. At the commencement of the hearing, I asked Mr Lindsay what his position was in relation to ground 2, i.e. whether the judge had considered and applied the Presidential Guidance. He accepted that he could not point to anything in the judge's decision which shows that she had considered and applied the Presidential Guidance. However, he submitted that the judge had considered and assessed the

psychiatric report of Dr Dhumad and that she was entitled to attach no real weight to Dr Dhumad's report. There was therefore (in his submission) no remaining basis for the appellant to be treated as a vulnerable witness. Mr Lindsay relied upon headnote 1 of the decision in SB (vulnerable adult: credibility) Ghana [2019] UKUT 00398 (IAC) which reads:

> (1) The fact that a judicial fact-finder decides to treat an appellant or witness as a vulnerable adult does not mean that any adverse credibility finding in respect of that person is thereby to be regarded as inherently problematic and thus open to challenge on appeal.

7. Mr Lindsay submitted that, on the judge's assessment of the psychiatric report, it was difficult to see how the judge could have reached a different conclusion on the appellant's credibility.

8. I informed Mr Lingajothy that I did not need to hear from him.

9. I then announced my decision that ground 2 was established and that it was material to the outcome. I therefore set aside the judge's decision in its entirety.

10. Mr Lingajothy submitted that the appeal should be remitted to the First-tier Tribunal. Mr Lindsay was neutral on this issue.

11. I decided that para 7.2(b) of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") applies and that the appeal was therefore to be remitted to the First-tier Tribunal for a judge of that Tribunal other than Judge Moffatt to re-make the decision on the merits on the appellant's asylum and humanitarian protection claims and her Article 3 human rights claim.

12. The re-making will not include the appellant's Article 8 claim because this was not pursued before the judge (para 72 of the judge's decision) and the grounds of appeal to the Upper Tribunal did not raise Article 8.

13. I will now give my reasons for setting aside the decision.

14. I have no hesitation in concluding that Mr Lindsay's submissions were misconceived. The Presidential Guidance requires a judge to consider whether an appellant is a vulnerable witness and if so, to consider and apply the guidance *in assessing credibility.* Mr Lindsay accepted that there was no indication at all in the judge's decision that she had considered and applied the Presidential Guidance. Indeed, there is no mention at all in the judge's decision of the Presidential Guidance. It is therefore no answer to say that, even if the judge had considered and applied the Presidential Guidance, it is difficult to see how the judge could have reached a different decision given her assessment of the psychiatric report.

15. Likewise, Mr Lindsay's reliance upon headnote 1 of SB Ghana is misconceived because headnote 1 concerns decisions of judges in which the Presidential Guidance has been considered, whereas it is clear, from his own admission, that there was no indication in the judge's decision that she had considered and applied the Presidential Guidance or even that she was aware of the Presidential Guidance.

16. Mr Lindsay's submission, that the judge's failure to consider and apply the Presidential Guidance makes no difference to the outcome given that she had decided to apply "*no real weight*" weight to the psychiatric report of Dr Dhumad, ignores the decision of the Court of Appeal in Mibanga. This is not a submission that he could have properly advanced. If a judge fails to consider and apply the Presidential Guidance in the assessment of credibility, it is no answer to say that, given that the judge gave little or "*no real weight*" weight to the psychiatric report, the Presidential Guidance could not have made a difference.

17. For the reasons given above, the judge materially erred in law in her assessment of credibility by failing to consider and apply the Presidential Guidance.

18. Accordingly, it is not necessary for me to consider grounds 1 and 3.

19. I am satisfied that para 7.2(b) of the Practice Statements applies because the nature or extent of the judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

20. As I pointed out to Mr Lingajothy, the appellant would be well advised to obtain and submit to the First-tier Tribunal an up-to-date psychiatric report.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside. This appeal is remitted to the First-tier Tribunal for a judge of that Tribunal other than Judge Moffatt to re-make the decision on the merits on the appellant's asylum and humanitarian protection claims and her Article 3 human rights claim.

Signed: Upper Tribunal Judge Gill Date: 9 January 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**