IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000551

First-tier Tribunal No:
PA/50363/2021; IA/05016/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25 June 2023

Before
UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between
S T S
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B Jones, Counsel instructed by Duncan Ellis Solicitors
For the Respondent: Ms S Lecointe, Senior Home Office Presenting Officer

Heard at Field House on Friday 2 June 2023

Order Regarding Anonymity
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.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Burnett promulgated on 25 November 2022 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 11

January 2021, refusing the Appellant's protection and human rights claims.

2. The Appellant is a national of India. On 27 May 2010, he applied to visit his brother-in-law in the UK. That application was granted on 28 April 2011 (although the Appellant claims to have arrived in the UK ten days earlier). His leave expired on 18 November 2011. He claimed asylum on 15 October 2019. He claims to be at risk from the authorities in India as a result of having been forced to support a terrorist organisation. He says that he is wanted on criminal charges in that regard. He also claims to be at risk from that organisation.

3. The Respondent did not accept the credibility of his account. The Judge also rejected the account as lacking in credence. He therefore dismissed the appeal. Relevant to the error of law issue is the Appellant's mental state. The Appellant relied in this regard on a report from Dr Saleh Dhumad MBCHB, MRCPSYCH, NSC CBT dated 11 June 2021 ("the Psychiatric Report") as supplemented by a letter from Dr Dhumad dated 6 May 2022. The Appellant also relies on a further medical report in relation to scarring dated 16 June 2021, compiled by Dr Andres Izquierdo-Martin FRCSEd, FRCEM ("the Scarring Report").

4. The Appellant initially appealed on grounds that there had been an excessive delay in the promulgation of the Decision, that the Judge had not properly evaluated the medical evidence and that the Judge had relied on "external evidence" in order to reject the Appellant's claims. Permission to appeal on those grounds was refused by First-tier Tribunal Judge L K Gibbs on 30 December 2022 in the following terms so far as relevant:

> "..2. The first ground of appeal is the delay in the promulgation of the decision; some 6 months after the appeal hearing. The author of the grounds does not however provide any tangible example of the way in which the delay has affected the decision, and although such a delay is very regrettable, I am not persuaded that this amounts to an arguable error of law on behalf of the judge.
> 3. I am not persuaded that the criticisms of the way in which the judge dealt with the medical evidence. Further, there is no evidence of a lack of impartiality as asserted.
> 4. The grounds of appeal do not disclose an arguable error of law."

5. The Appellant renewed the permission application to this Tribunal on different grounds which can be summarised as follows:
   Ground 1: The hearing was procedurally unfair as the Appellant was not treated as a vulnerable witness as he should have been.
   Ground 2: The Judge's approach to the medical evidence was flawed.
   Ground 3: The Judge failed to consider the Appellant's Article 3 claim based on his mental health and specifically the risk of suicide.
   Ground 4: The Judge similarly failed to consider the suicide risk in the context of the Appellant's Article 8 claim.

6. Permission to appeal was granted by Upper Tribunal Judge Norton-Taylor on 21 April 2023 in the following terms:

> "1. The renewed grounds differ in certain respects from those put forward to the First-tier Tribunal when seeking permission. I am concerned only with the most recent version.
> 2. Ground 1 asserts that the judge was wrong not to have treated the appellant as a vulnerable witness and applied the relevant guidance to the evidence. The appellant had not been called to give evidence at the hearing and was not therefore a 'witness' as such. The grounds of appeal do not identify any difficulties in the evidence previously given by the appellant which might have been caused by mental health problems. I see little merit in the first ground.
> 3. To the extent that difficulties arising in evidence previously given by the appellant required to be assessed in the context of any mental health conditions, the judge's assessment of the medical report was relevant. In that respect, I am just persuaded that ground 2 has sufficient merit for permission to be granted. It may ultimately be said that the judge in fact assessed Dr Dhumad's report in light of the evidence as a whole and was entitled to place little weight on it. On the other hand, it is arguable that the particular focus set out at [29] and [30] was insufficient.
> 4. The prospects of the remaining grounds of appeal are effectively dependent on the appellant making out ground 2. I would just observe that the inclusion of an argument in an ASA does not necessarily mean that the same argument is 'pursued' before a judge at a hearing.
> 5. I grant permission on all grounds. Quite clearly, the grant of permission should not be taken in any way as an indication that the appeal will succeed."

7. The matter comes before us to decide whether the Decision contains an error of law. If we conclude that it does, we must then decide whether the Decision should be set aside in consequence. If the Decision is set aside, we must then either re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal for re-determination.

8. We had before us a core bundle of documents relating to the appeal, the Appellant's bundle ([AB/xx]) and Respondent's bundle before the First-tier Tribunal ([RB/xx]) together with the Appellant's skeleton argument before the First-tier Tribunal and further loose documents which were before the First-tier Tribunal including the letter from Dr Dhumad, a witness statement from the Appellant dated 28 March 2022 to which is appended a signed statement from Mr Ishfarq Hussain Mowlana also dated 28 March 2022 purporting to deal with the Appellant's mental state at the time of giving the statement. There are also a few pages of the Appellant's medical records relating to the Appellant's attendance at Barts Health NHS Trust Emergency Department on 15 March 2022 (apparently provided to the First-tier Tribunal to support an application to adjourn an earlier hearing).

9. Having heard submissions from Ms Jones and Ms Lecointe, we indicated that we would reserve our decision and provide that with reasons in writing. We now turn to do that.

DISCUSSION

10. Whilst Ms Jones noted the terms of the permission grant, she indicated that she continued to pursue all grounds. We take those in order.

Ground 1: Procedural Unfairness and the Appellant's Vulnerability

11. The Appellant did not give evidence before Judge Burnett. He prepared a witness statement to which is appended (as we have noted) a statement from the caseworker who took it attesting to the manner in which it was taken. We have been able to confirm that the statement was before Judge Burnett, but the Judge did not focus on this statement when dealing with the inconsistencies in the Appellant's account. In any event, the Appellant cannot complain about any reliance placed by the Judge on this statement given that it was prepared with what the Applicant's caseworker presumably considered were sufficient safeguards.

12. Nor can any complaint be made about any reliance placed by the Judge on what the Appellant told the medical experts. We come to this evidence below. This was however evidence put forward by the Appellant himself and it must be assumed that those experts, particularly Dr Dhumad, applied such safeguards as they considered appropriate when taking the Appellant's account.

13. It is worth noting at this juncture that Dr Dhumad, in the Psychiatric Report, opined that the Appellant was fit to attend a court hearing and give oral evidence ([13.6]). However, by the time of his later letter (6 May 2022), Dr Dhumad expressed the view that the Appellant was unfit to attend a hearing or to give oral evidence. He did not provide any explanation for that change of opinion, particularly since his medical diagnosis was the same. We will come on to the substance of the medical evidence below. Suffice to say for the purposes of this ground, the Appellant did not give oral evidence before the Judge because it was considered that he was unfit to do so.

14. Ms Jones nonetheless placed reliance on the Joint Presidential Guidance Note No 2 of 2010 entitled "Child, Vulnerable Adult and Sensitive Appellant Guidance" ("the Guidance"). We make the following observations about the Guidance.

15. First, it is addressed to Tribunal Judges. It extends to appellants and witnesses but is clearly concerned with the giving and taking of evidence at Tribunal hearings.

16. Second, so much is clear from the internal sub-headings which refer to the period prior to the substantive hearing, the hearing itself, the assessment of the evidence given and the framing of the subsequent decision.

17. Third, the purpose of the Guidance is expressly "to assist a vulnerable individual to understand and participate in the proceedings". The Guidance applies "to individuals who may be appellants or witnesses". Whilst we accept that there is reference to "[d]ocuments, process and procedure which fail to take into account vulnerability" which "may compromise the quality of the evidence produced", as the Guidance also makes clear, the Respondent has its own protocols and guidance documents which apply and set standards for dealing with vulnerable individuals.

18. We add that nothing said in AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1121 alters our view about the impact or application of the Guidance.

19. We therefore reject Ms Jones' submission that the Guidance has anything to say about the reliance which might be placed on earlier documents, in particular the asylum interview record. That record has to be looked at on its face to identify if reliance can be placed on it.

20. The asylum interview records appear at [RB/60-94] (first interview) and [RB/95-128] (second interview). Those are dated 6 February 2020 and 24 November 2020 respectively. As Ms Lecointe pointed out, the Appellant was legally represented. The interview records indicate that the legal representative was present at both interviews. That representative could have intervened if the interview was considered inappropriate. The Appellant could also, via those representatives, have corrected any answers given if those were thought to be affected by the Appellant's mental state. Although the Appellant indicated that he suffered from depression at the time, he indicated that he felt fit to be interviewed.

21. As we have already noted, Dr Dhumad expressed the opinion in 2021 that notwithstanding the Appellant's mental health at that time, the Appellant was fit to attend a hearing and to give oral evidence. There is nothing on the face of the interview record which suggests that the Appellant struggled to answer questions. He did not claim that he was unable to remember events. His solicitors provided a statement of additional grounds subsequently seeking to clarify certain issues but did not say that the interview could not be relied upon. Nor is there anything to suggest that the Appellant raised this as an issue at the appeal hearing.

22. As we pointed out to Ms Jones, the Judge did not rely solely on internal inconsistencies at interview and inconsistencies with the Appellant's

statement. He relied also on documents which were inconsistent with the Appellant's account. As the Judge noted at [34] of the Decision, there were inconsistencies between the Appellant's account and visa applications made by him. Ms Jones said in response that this might be indicative of an inability to follow a chronology caused by the Appellant's mental state. However, these were points of which the Appellant must have been aware. They could therefore have been addressed in that way whether before the appeal or in the Appellant's statement. There is no attempt to explain those inconsistencies (as the Judge pointed out at [34] of the Decision).

23. Whilst the Appellant does make assertions at [4] and [5] of his statement about the way in which the interview was conducted and the impact of his mental health on his answers, the way in which he describes that interview is not made out on a fair reading of the interview record. As we have already noted, answers which were inconsistent could have been explained by the Appellant's legal representatives after the interviews but were not. The legal representative was present at both interviews and could have asked for the interview to be stopped if it was considered oppressive or noted the conduct of it on the face of the record when the interview was completed. No complaint was made at the time or immediately afterwards.

24. For those reasons, the Judge was entitled to place weight on the interview record and to rely on inconsistencies within that record and with other evidence. Ground one is not made out.

Ground 2: Flawed assessment of the medical evidence

25. The Appellant relied on the Scarring Report at [AB/2-16] and the Psychiatric Report at [AB/17-35]. The Appellant's second ground is limited to a challenge to the Judge's approach only to the Psychiatric Report. The Psychiatric Report was, as we have already noted supplemented by the letter from Dr Dhumad dated 6 May 2022 in which he changed his opinion about the Appellant's fitness to give evidence (without explanation of any changes in the Appellant's mental health).

26. The Judge sets out the evidence about the Appellant's mental health condition at [28] to [31] of the Decision as follows:

> "28. I will start with a consideration of the medical evidence. Dr Dhumad provided a report after a remote assessment of 2 hours duration. It is dated 11 June 2021. The doctor sets out that the appellant had been present in the UK from 2011 before he claimed asylum in 2020. The doctor set out a very short history including that the appellant claimed he had been detained for a year in 2008. The appellant stated that he had remained in India for about 8 months after his release. The appellant's family, mother 2 brothers and 2 sisters remain in India. The appellant only registered with his GP in 2018. It was stated he had been using the medication he had from India initially. At the time of the report the appellant was recorded as not taking any medication. The doctor concluded that the appellant had PTSD

> symptoms and was diagnosed with a moderate depressive episode. It is stated that the most likely cause of the PTSD was his torture. There was a moderate risk of suicide but this would be significant if the appellant were removed to India. At this juncture the doctor's opinion was that the appellant was fit to attend court and give oral evidence. Given the doctor's conclusions he stated that the appellant was not fit to fly. In an addendum letter dated 6 May 2022 the doctor stated that the appellant was not fit to give evidence. The appellant stated he was still not taking any medication. The doctor stated that the appellant had suicidal thoughts but had not acted upon them due to his mother.
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> 29. I should note that in the interview, February 2020, the appellant stated that he had taken mirtazapine for 4 years in India. Given the appellant fled India only months after his detention it is not at all clear why he was taking this medication for 4 years in India. The appellant stated that he was not taking medication at the time of the interview.
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> 30. The appellant had been in the UK for over 7 years before he registered with a GP. It is not clear what he had been doing for all that time and how he supported himself. I do not accept that a person who had arrived in the UK in 2011 after having spent over a year in detention and being tortured would wait until 2018 to register with a GP or seek out other help before this. I conclude that the mental health report provides little support for the appellant's health being caused by his detention and torture.
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> 31. I should also note that the appellant stated he did not have any medical conditions in his screening interview of October 2019. By the time of the second interview in November 2020, the appellant was still not taking any medication prescribed in the UK."

27. The complaint as pleaded and on which Ms Jones relied is that the Judge's discounting of the Psychiatric Report "appears to be based solely ono the basis of the appellant not registering with a GP until 2018 despite arriving in the UK in 2011 …the appellant not taking any medication … and the appellant's failure to explain why he had taken mirtazapine for 4 years in India". It is submitted that those points do not warrant the Judge's conclusion about the Psychiatric Report whether taken together or singly.

28. The analysis there set out is somewhat simplistic. What the Judge was doing at [28] to [31] was considering the Psychiatric Report in the context of the overall medical evidence (or lack of it).

29. Dr Dhumad opined that the Appellant's mental condition which he diagnosed as PTSD was caused by the Appellant's detention and torture. Dr Dhumad was apparently told that the Appellant was detained for one year in 2008 when he was tortured ([AB/21]), whereas the Appellant said in interview that he was detained for one year in one prison from October 2008 and then another for a further year (Q150, [RB/90]). Dr Dhumad was also told that the Appellant left India eight months after his release (which would have been in 2009 and not 2011: an inconsistency on the face of the Psychiatric Report and which Dr Dhumad does not consider). Dr Dhumad was apparently not told that the Appellant had been taking medication for depression for four years prior to leaving India (Q4, [RB/65]) and therefore did not take that into account when considering

whether the Appellant's detention and torture were causative of the depression on that analysis (although he did apparently have the interview records where this was mentioned). Dr Dhumad did not explain why the Appellant would not have sought medical help much sooner after his arrival in the UK if he was suffering from PTSD directly caused by his treatment in detention in 2008-2009.

30. On the other hand, the Judge was aware that the causation attributed did not tally with the Appellant's account given that the Appellant left India in April 2011 but on his own account was not arrested until October 2008 therefore only two and a half years before he left India. The Judge's reference to that is therefore an indication that he did not accept Dr Dhumad's explanation of the causation for that reason. The Judge also noted that the Appellant was not taking any medication when he first made his asylum claim in 2019 – a factor which Dr Dhumad had not commented upon.

31. Similarly, although Dr Dhumad was made aware that the Appellant's GP had been consulted and had not prescribed any medication or referred the Appellant for counselling, Dr Dhumad does not explain why that would be the case if the Appellant's mental illness is as severe as Dr Dhumad suggests. Again, that was a relevant factor to which the Judge was entitled to have regard when considering the weight to place on the Psychiatric Report ([30] and [31] of the Decision).

32. We drew Ms Jones' attention to the Tribunal's guidance in HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC) during the hearing before us. Whilst we accept that the Judge did not refer to this guidance, his approach to the weight which should be given to the Psychiatric Report in the context of other available medical evidence is consistent with it. Dr Dhumad did not engage with the other medical evidence (or lack of it) in the Appellant's case and the Judge was entitled to give less weight to the Psychiatric Report in consequence.

33. Ms Jones for her part referred us to the guidance given by this Tribunal in JL (medical reports – credibility) China [2013] UKUT 145 (IAC). She fairly recognised that the overall tenor of that guidance is, in summary, the greater the reliance placed on the Appellant's account by a medical expert, the less weight which might be given to the report as supportive of that account. She submitted that in this case Dr Dhumad had received only a short account and so had not relied on what the Appellant told him.

34. We reject that submission. The Psychiatric Report is full of references to what Dr Dhumad was told or had reported to him by the Appellant. Most if not all of the background, personal history, social history and mental health history can only have come from the Appellant.

35. We have already commented on the fact that Dr Dhumad made no reference to the Appellant being on medication for four years in India and

so, whilst we accept that Dr Dhumad may have had the Appellant's interview records, he cannot have relied on those for, for example, the account of the Appellant's mental health history.

36. Dr Dhumad did not apparently have the Appellant's GP records (although those are unlikely to have given much information since the Appellant was not prescribed medication or referred for counselling in the UK). He did not comment on why the Appellant might not have sought out treatment until he claimed asylum nor why a GP would not have prescribed any medication or counselling once consulted. He did not critically evaluate what he was told, missing for example, the inconsistency between the period for which the Appellant said he was detained and the period thereafter before he left the UK against the date when he in fact left India.

37. For those reasons, and whilst the Judge's reasons for giving little weight to Dr Dhumad's report are brief, we conclude that the Judge was entitled to give little weight to the Psychiatric Report for the reasons he gave. The second ground is not made out.

Grounds 3 and 4: Failure to consider Article 3 and Article 8 ECHR

38. We take these two grounds together as both are critical of the same paragraph of the Decision. At [49] of the Decision, having rejected the Appellant's protection claim as not credible, the Judge said this:

> "I have made my findings above. The appellant's article 8 claim is based upon his health. The medical claim is not pursued before me on the basis of article 3. I have set out my findings above. The appellant is not taking any medication in the UK. There is an unexplained reference to taking medication in India for 4 years previously. I conclude that the appellant could return to his family in India and receive any medical treatment he might need. I conclude that there is no meritorious basis of an article 8 claim."

39. By his third ground, the Appellant submits that the Judge was wrong to say that there was no medical claim based on Article 3 ECHR. The pleaded ground and Ms Jones' submission relies on the skeleton argument as raising such a ground. Under the heading of "Human Rights Claim", at [19] and [20] of the skeleton argument, the Appellant's solicitors said this:

> "19. It is submitted that the UK would be in flagrant breach of its obligations under Art 3 and Art 8 if the Appellant are [sic] forcibly removed. Reliance is here placed on the case of **Bensaid** which stated '*mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity and the preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life'* (para 47).

> 20. The Tribunal is respectfully requested to give adequate weight to the content of the Scar Report and Psychiatric Report and the other evidence relied on by the appellant."

40. We begin with the point made by Judge Norton-Taylor when granting permission that, simply because a point is put forward in a skeleton argument does not mean that it is subsequently pursued.

41. Furthermore, whilst we recognise that the skeleton argument did there refer to Article 3 ECHR, this submission was in the context of a protection claim which overlaps with Article 3 ECHR. We anticipate that this is the way in which the Judge understood the submission. As is clear from what follows, the mental health claim is relied upon in the context of Article 8 ECHR.

42. In any event, and even if we are wrong about this, the Judge did deal in substance with an Article 3 medical claim by considering whether the Appellant could receive treatment for his condition in India. The Appellant was not receiving any treatment for his condition in the UK and said he had been given medication previously whilst in India. The Judge's reasoning on those facts is amply sufficient to deal with any medical claim being run on Article 3 ECHR grounds.

43. The only point which remains open to the Appellant on Article 3 grounds relates to the suicide risk. Understandably therefore both the pleaded third ground and Ms Jones' submission focussed on this risk. In short summary, Ms Jones submitted that, if the Judge rejected the Appellant's account of being tortured, then either Dr Dhumad was wrong about the Appellant's presentation and diagnosis or Dr Dhumad was wrong about causation. Either way, she submitted, the Judge had to deal with this in the context of Dr Dhumad's opinion regarding the suicide risk and had failed to do so.

44. We consider the answer to this point lies in the guidance given by this Tribunal in AXB (Article 3 health: obligations; suicide) Jamaica [2019] UKUT 397 (IAC) to which we alluded during the hearing before us and which itself relies at [96] to [98] on the Court of Appeal's judgment in J v Secretary of State for the Home Department [2005] EWCA Civ 629. As the Tribunal said at [98] by reference to the Court of Appeal's judgment, "if the fear upon which the suicide risk is predicated is not objectively well-founded, that will tend to weigh against there being a real risk".

45. In this case, the Judge had already found that the Appellant's claim was not credible and therefore rejected Dr Dhumad's reliance on that claim as having caused the mental health condition which Dr Dhumad had diagnosed. The Judge did not have to repeat the point. It is implicit in what is said at [28] to [31] of the Decision. This is not a case where the Appellant had attempted suicide in the UK or even had suicidal ideation. His mother was said by Dr Dhumad to be a protective factor. The reason why Dr Dhumad considered the risk to be elevated on return

was precisely because Dr Dhumad accepted the Appellant's account as to the cause of his mental health condition. Having rejected that assessment as to causation, the Judge did not have to consider what might flow from it in terms of suicide risk. The fear was not objectively well-founded (or even subjectively held) given the credibility findings.

46. Whilst we accept that Judge Burnett did not conduct this analysis, any error in that regard could not be material given his findings on the protection claim. The third ground is not made out.

47. The fourth ground is also predicated on the increased risk of suicide and fails for the same reason.

CONCLUSION

48. The Appellant has failed to identify any material errors of law in the Decision. We therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

NOTICE OF DECISION

The decision of First-tier Tribunal Judge Burnett promulgated on 25 November 2022 does not contain any material error of law. We therefore uphold the decision. The Appellant's appeal remains dismissed.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
15 June 2023