IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001431
First-tier Tribunal No: PA/51654/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

T.V.N.
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Hodson, Elder Rahimi Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

Heard at Field House on 22 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

1. The appellant is a male citizen of Vietnam. He appealed to the First-tier Tribunal against a decision of the Secretary of State dated 27 October 2020 refusing him international protection. The First-tier Tribunal, in a decision following a hearing on 27 January 2023, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Permission was granted in the First-tier Tribunal by Judge Pickering:

"1.The application is not out of time given the time at which the promulgation of the determination took place.

2. In relation to ground 1, it is arguable that whilst referring to Professor Katona's report, that the Judge failed to properly take into account the full content of report. The report was not based on the appellant's narrative alone [§32 cf CB p.39, 46 para 8.3]. Having appeared to accept the diagnosis given by Professor Katona, it is arguable that the Judge did not explain why they rejected the observations regarding clinical plausibility [CB p.46 para 8].

3. Permission is granted on all grounds."

3. Ground 1 argued that the judge erred in their approach to Professor Katona's psychiatric report; Ground 2 argued that the judge erred in requiring corroboration; Ground 3 related to the judge's treatment of the appellant's claim to be at risk of being trafficked; Ground 4 argued that the judge failed to make any findings in relation to the appellant's sur place claim in respect of his activities in support of the Viet Tan party in the UK.

Discussion

4. In respect of Ground 4, Mr Avery for the respondent properly conceded that the judge had failed to deal with the appellant's sur place argument.

5. In relation to Ground 1 the judge fell into clear error in his approach to the expert report. Whilst it is immaterial what order a judge deals with evidence, the decision of the First-tier Tribunal fell into the **Mbanga v Secretary of State 2005] EWCA Civ 367** error. Wilson LJ in **Mbanga** provided the following advice:
"What the fact finder does at his peril is to reach a conclusion by reference only to the applicant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence."

6. The judge reached negative credibility findings first, largely repeating what was said in the respondent's refusal letter, before considering the medical evidence, seeking to justify those conclusions by largely ignoring or rejecting what the medical expert said, without providing adequate reasons for those findings.

7. The judge's first mention of the expert report was at paragraph [18] of the decision, where the judge states:

"the expert makes no assertion that the appellant has a memory loss issue presumably because the expert is not an expert in that field. It is also remarkable that the appellant who not only claims to have a memory problem, but one who suffers from other conditions to which I shall refer later, has not produced any evidence by way of any treatment for these conditions or being referred for investigations by his GP. Accordingly, even if the appellant has a memory issue, I do not accept that these are adequate explanations for why his evidence was inconsistent. Just to reiterate, I agree with the respondent's comments that the appellant cannot claim memory loss when it comes to inconsistencies in his asylum account, but is able to give detailed account in regards other matters".

8. The judge's findings however, ignore what the expert, Professor C Katona an Emeritus Professor of Psychiatry said about the appellant's memory: Professor Katona noted that the appellant stated repeatedly that he had problems with his

memory and in view of this complaint (6.12 of the report) Professor Katona assessed the appellant's 'cognitive function with a widely used and well-validated cognitive screening test, the Mini Mental State Examination' with the appellant scoring equivalent to 11/30 in the 'moderately impaired' range. The appellant, when a memory test was administered by Professor Katona, was able to repeat only one out of three words a few minutes afterwards. He scored 2/5 in a simple calculation task. Professor Katona also noted that the appellant did not remember his solicitor's name, even after reminded of it and was unable to remember when he had last seen his solicitor.

9. Although Mr Avery submitted that where Professor Katona stated that the appellant could "name a watch but when asked to name a pen he could only say 'to draw', that could be an interpretation error, there are a number of problems with such a submission: Professor Katona interviewed the appellant with the assistance of an interpreter, there being no indication anywhere in the report that there were any issues with interpretation, and certainly no indication that the interpreter was struggling to the extent that he misinterpreted the appellant's response that he could not name a pen. More importantly, although Mr Avery's comments attempted to engage with the reasons given by Professor Katona for finding difficulties with the appellant's memory, the judge singularly failed to do so and indeed mistakenly stated that the expert had not indicated a memory loss issue.

10. The judge then contradicted his earlier finding at [18] that the expert had not indicated a memory loss issue, at paragraph [33] in stating that 'whilst I have no reason to doubt the diagnosis made by the expert and the likelihood that the appellant may have memory problems, these facts do not by themselves inexorably lead to finding that the appellant's account is true.'

11. The judge has failed to adequately engage with the expert's report and the specific evidence in relation to the appellant's cognitive impairment and his PTSD. If the judge did not accept the expert's detailed evidence on the appellant's memory, including that the appellant's cognitive difficulties are likely 'to reflect a lifelong intellectual disability, though it is also possible that they were caused or aggravated by the head injury he describes' the judge needed to say so and explain that reasoning. Professor Katona concluded at paragraph 9.4 that the appellant had an impairment of mind and brain (PTSD and likely intellectual disability) as a result of which 'he is unable to retain information and unable to weigh up information in relation to conduction his immigration case.'

12. For the judge to state as he did, at [33], that he had no reason to doubt the expert or that the appellant had memory problems, but that this did not lead 'inexorably' to finding that the account was true, was wholly inadequate and fails to engage with how those memory problems might have impacted the appellant's ability to provide a coherent account, including to the respondent.

13. Although the judge relies on the respondent's conclusions that the appellant was able to give detailed evidence in some matters but not others, Professor Katona's report repeatedly describes the appellant's account as 'fragmented' and as the judge notes, the appellant did not give oral evidence, with paragraph 9.5 of Professor Katona's report advising that the appellant lacked capacity to give evidence. Professor Katona at 9.5 advised that in view of the appellant's PTSD and likely intellectual disability, if he did give evidence 'allowance should be made for his difficulties in giving a full and clear account of his experiences'.

Again the judge in his consideration of the appellant's evidence failed to give any adequate reasons as to why he made no allowance for the appellant's PTSD and likely intellectual disability in his consideration of the appellant's account, instead the judge attached adverse inference to the fact that the appellant provided different details to the expert. If the judge rejected the expert's explanation for the appellant's failure to provide a 'full and clear' account, it was incumbent on him to say so and provide adequate reasons for this conclusion.

14. The judge, at [32] briefly addressed Professor Katona's report (although referred only to PTSD with no reference in the decision to Professor Katona's evidence of a likely intellectual disability) stating that:

"I cannot overlook the fact that the report is based entirely on the appellant's own narrative and the expert's own observations about the appellant's speech and verbal demeanour.'

15. The judge's findings misstate how Professor Katona prepared his report, with the expert at 8.3, confirming that he based his professional opinion on his 'objective clinical observations of his speech and verbal demeanour and not merely on the symptoms he described to me'. Professor Katona also specifically considered and rejected the possibility that the appellant was feigning or exaggerating his mental symptoms.

16. It is also unclear why the judge attaches adverse inference to the expert's approach to his diagnosis, with Professor Katona setting out what evidence he considered, which included the appellant's interviews and the refusal letter as well as the appellant's GP records. The Professor, at 1.5, confirmed that he was confident in his psychiatric diagnosis and it is unclear on what basis the judge seeks to undermine those conclusions, whilst in somewhat confused findings also purporting to accept the diagnosis.

17. In failing to adequately engage with Professor Katona's report, it is evident that the First-tier Tribunal also failed to engage with whether and how Professor Katona's reasoned evidence in relation to the appellant's cognitive difficulties, impacted on the reliability of the respondent's assessment of the appellant's credibility, which the judge appears to have adopted and relied on, wholesale.

18. Whilst the judge also criticised the expert for 'not relying on material from any other source' at 1.4 of the report, despite having the appellant's GP records, the judge has again misunderstood Professor Katona's report which actually stated at 1.4 that he 'does not rely on material from any other sources **unless specifically stated** (my emphasis).' Professor Katona at 5.1 then went on to specifically set out evidence from the GP records, that on 28 April 2021 the appellant's GP noted that the appellant 'presented with 2-3 weeks of headaches – mostly on top of head and the pain is dull in nature'. He 'had head injury in the past – was hit by a stick by another person'.

19. Although Mr Avery relied on **HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111** and criticised the expert for only mentioning the GP notes once, that is to ignore that the judge mistakenly found that Professor Katona did not consider the GP evidence at all. However, in relation to **HA**, whilst not a criticism made by the judge, there is nothing in Professor Katona's report to suggest that he attempted to 'brush aside the GP records'. There was nothing identified in the GP records that might have differed from the expert's opinion.

HA advised that GP records 'may paint a broader picture of his or her mental health than is available to the expert psychiatrist' which was arguably the case here, as the appellant had presented to the GP with a persistent headache and had mentioned a previous head injury.

20. Having mistakenly therefore, at [32] of the decision, recorded that the Professor Katona did not take into account material from other source, the judge went on to state that it was significant that the appellant had not reported his mental health conditions, particularly his memory problems to his GP, without considering that the appellant had reported a head injury. Those findings also fail in my view, to consider the appellant's actions through the prism of either his likely lifelong intellectual disability or his PTSD. Professor Katona did engage with the appellant's GP records as **HA** required him to do.

21. The judge therefore fell into error in his consideration of both Professor Katona's report and his approach to the appellant's evidence. Whilst Mr Avery submitted that the judge was not wrong in finding that the fact that the appellant has memory issues did not mean his account is true and that there was no material error, the judge failed to approach credibility in the required manner. Whilst cognitive/memory problems do not mean that an account must be accepted as true (and no such claim was made by the expert) they do require a careful consideration of the appellant's evidence in light of the psychiatric evidence, with such an approach missing in this case.

22. Professor Katona at paragraph 8 also considered clinical plausibility, in line with the guidance in **JL (medical reports- credibility) China [2013] UKUT 00145 (IAC)** and the Court of Appeal in **MN and IXU [2020] EWCA Civ 1746** indicating that there was nothing in the appellant's account that led him to consider the account was not clinically plausible with Professor Katona again advising that the appellant's mental health problems' were 'likely to have impeded him in giving a full, clear and consistent account of his traumatic past'.

23. The judge's error was therefore material as it infected his entire approach to the evidence before him. Given that Grounds 1 and Grounds 4 are made out, I need not consider Grounds 2 and 3, other than to observe that the judge's error of approach also tainted his approach to his findings in not accepting that the appellant had provided a 'reasonable explanation' for not providing any paperwork in relation to his bail. There was nothing to suggest that the appellant had ever been asked to provide such an explanation, with this point not taken by the respondent in the refusal letter, or it would appear by the presenting officer at the hearing. Equally there is no indication that the judge considered the appellant's behaviour (including in not explaining why he had not provided any paperwork) through the prism of his likely lifelong intellectual difficulty and his PTSD.

24. Equally, whilst the ground in relation to trafficking is not as strong as the remaining grounds, it cannot be said definitively that the judge would have reached the same conclusion, that the risk of the appellant being trafficked was 'entirely speculative' had he not fallen into error in his approach to Professor Katona's report and the evidence as a whole.

25. The decision of the First-tier Tribunal therefore contains material errors of law, such that it cannot stand. Given the nature and extent of the fact-finding required, I remit the appeal to the First-tier Tribunal to be considered de novo, other than by Judge Hussain.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law and is set aside with no findings of fact preserved. The appeal is remitted to the First-tier Tribunal. No findings of fact are preserved.

M M Hutchinson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 July 2023