IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001605
First-tier Tribunal Nos:
HU/52251/2022
LH/00689/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 20 July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

MD AMRAN MIAH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. D. Balroop, Counsel, instructed by City Heights Solicitors
For the Respondent: Ms. S. Cunha, Senior Home Office Presenting Officer

Heard at Field House on 4 July 2023

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Chana (the "Judge"), promulgated on 21 February 2023, in which she dismissed the Appellant's appeal against the Respondent's decision to grant further leave to remain on human rights grounds. The Appellant is a national of Bangladesh who appealed against the decision on Article 3 medical grounds.

2. Permission to appeal was granted by Upper Tribunal Judge Lindsley as follows:

> "The grounds with respect to the contended factual errors are arguable, perhaps most importantly with respect to the GP notes which record anxiety and depression and prescribing anti-depressants first in 2016 not 2021, an error which may have coloured the First-tier Tribunal Judge's consideration of the other psychological evidence. It will be for the Appellant to show that this error was ultimately material

> in the context of the other findings. The other grounds appear less arguable but all may be pursued at the hearing".

3. The Appellant attended the hearing. I heard oral submissions from Mr. Balroop and Ms. Cunha, following which I reserved my decision.

Error of Law

4. In his submissions Mr. Balroop focused on the first two grounds of appeal. With reference to Ground 1 he submitted that the Judge had applied the wrong standard of proof for Article 3. It was not clear that she had been aware of the lower standard of proof required for Article 3 claims. This was a fundamental and material error of law.

5. At [35] of the decision the Judge states:

> "I have considered all the evidence of this appeal, including evidence to which I have not made specific reference. The burden of proof is upon the appellant and the standard of proof is on a balance of probabilities. Where the Respondent has to prove anything, the burden of proof is on her on a balance of probabilities. The appellant claims that any attempts to return him to Pakistan will breach his rights under Articles 3 and 8 of the European Convention on Human Rights based on his medical condition."

6. It was accepted by Ms. Cunha that there was an error in this paragraph as the Judge had mixed the burden of proof. Article 8 was on a balance of probabilities, but there was a lower standard of proof for Article 3. Ms. Cunha accepted that the appeal had been brought on Article 3 grounds. However, she submitted that it was not a material error because, in effect, the Judge had applied the right test. She referred to the fact that the Judge had cited the cases of AM (Zimbabwe) [2020] UKSC 17 and Paposhvili [2017] Imm AR 867 at [36]. When discussing the risk of suicide at [66] the Judge had correctly followed the Upper Tribunal case of MY [2021] UKUT 232 (IAC). It was clear that she had applied this case when considering the risk on return to the Appellant on account of suicide. She submitted that the Judge had had the correct Article 3 test in mind.

7. Mr. Balroop in response submitted that the Tribunal was being asked to interpret what the Judge had meant, even though she had stated that she was applying the wrong standard of proof, an error which had been accepted by the Respondent.

8. I find that the Judge has incorrectly stated the standard of proof at [35]. She has conflated Article 3 and Article 8 and the standard of proof to be applied. In relation to the materiality, I have carefully considered whether the decision shows that she applied the correct burden of proof, notwithstanding this error.

9. Ground 2 asserts that the Judge misdirected herself when she found that the Appellant had been diagnosed with anxiety and depression in 2021, not 2016 as was shown by the evidence. Ms. Cunha accepted that the Judge had made an error in stating that the Appellant had not reported symptoms of anxiety and depression to his doctor until 2021. She submitted that the Judge's finding was that he was not "diagnosed" until 2021. I have considered the Judge's finding, and its materiality.

10. At [38] the Judge cited the cases of HA (expert; mental health) Sri Lanka and DK & RK (ETS: SSHD evidence; proof) India. She states:

> "In the case of human rights and protection appeals, however, it would be naïve to discount the possibility that an individual facing removal from the United Kingdom might wish to fabricate or exaggerate symptoms of mental illness, in order to defeat the respondent's attempts at removal."

11. At [41] she states:

> "The medical records provided start on 7 June 2014 for minor medical problems such as hay fever, low back pain, viral illness. It is not until March 2021, that the Appellant reports mixed anxiety and depressive disorder which is when the Appellant received himself (sic) at risk of removal".

12. I was referred to the GP records (page 101 of the Appellant's bundle). An entry for 4 April 2016 states that the Appellant presented with anxiety and depression and that he was prescribed citalopram. The problem is listed as anxiety state.

13. I find that this is evidence that the Appellant presented to his GP with symptoms of anxiety and depression far in advance of him being at risk of removal from the United Kingdom. The Judge found that the Appellant did not present with these kind of symptoms until he was at risk of removal, which is an error of fact. I do not accept Ms. Cunha's submission that she found that he was not "diagnosed" until 2021. The Judge does not refer to any diagnosis but to the Appellant reporting mixed anxiety and depression disorder. In 2016 the Appellant was given medication used to treat anxiety and depression. Ms. Cunha accepted that a factual mistake could be "inferred" from [41] but I find that it is not inferred, it is there on the face of the decision. The Judge has found that the Appellant did not report mental health problems until he was at risk of removal, when in fact he had reported them almost five years earlier.

14. Further, she made this finding having considered the caselaw which directly refers to exaggeration and fabrication of mental illness when an individual is facing removal. She found that the Appellant had not reported these symptoms until 2021 when he was at risk of removal.

15. Ground 3 asserts that the Judge failed to give adequate reasons in relation to the Appellant's mental health, particularly the risk of suicide. It was submitted in the grounds that there had been a misinterpretation of the evidence relating to the Appellant being at risk of suicide in Dr. Nallet's report. The report stated that he was "suicidal at times but not currently". The Judge concludes at [50] "this demonstrates that the appellant has been found not to be suicidal". It was submitted that there was a significant difference between "at times" and "not", and that the question before the Judge was whether the Appellant would become suicidal on return to Bangladesh.

16. Dr. Nallet's report is dated February 2022. The most therefore can be said is that in February 2022 the Appellant was not suicidal, but at that other at times he was. I find it is wrong to state that the Appellant has been found not to be suicidal. The report states that he is suicidal but not at the current time, February 2022. The Judge's consideration of suicide under Article 3 should relate to his return to Bangladesh. To start that consideration against a backdrop of a finding that he is not suicidal based on a misinterpretation of the evidence is an error of law.

17. Further criticisms were made of the Judge's findings in relation to mental health, for example, when referring to CBT. At [43] she states:

> "In his evidence the appellant said that he has been Receiving talking therapies weekly and that every week, a different person who talks. Therefore as of 21 November 2022, the Appellant was in a group session which shows that he was not considered to be at particular risk for expedited intervention".

It is not clear what the relevance is that it is a different person who talks every week, or whether this is a different participant or a different professional leading the group. It appears that the Judge has considered that the Appellant was not at risk as he was only participating in a group session. It is not clear where the evidence to corroborate this comes from, as there is no evidence of the criteria for "expedited intervention", or what intervention she means.

18. At [70] the Judge concludes:

> "I do not find the appellant's mental health problems are at such a critical stage that it would be inhuman treatment to deprive him of his once-a-day antidepressant tablet and talking therapies. The appellant's condition does not reach the high threshold of severity to evoke (sic) Article 3 of the European Convention on Human Rights on the basis of his medical condition as it is not even embryonic. Therefore the appellant would not face a real risk of being exposed to a serious, rapid and irreversible decline in state of health resulting in intense suffering or a significant reduction in life expectancy if returned to Bangladesh."

19. In making findings regarding his mental health problems, she finds that his medical condition "is not even embryonic". It is not clear exactly what she means by this but it is presumably with reference to her finding that he had not reported any mental health problems until 2021. However, the evidence before her was that he had reported mental health problems five years before this. She had also found that he was not suicidal, contrary to the evidence. The Judge stated the incorrect standard of proof for Article 3, as accepted by Ms. Cunha. She also misdirected herself as to when the Appellant had first reported mental health problems. Despite her quoting the relevant caselaw, given the mistakes in her consideration of the evidence, I find that it is to read too much into her decision to state with any certainty that she applied the correct standard of proof in considering Article 3. I find that this is a material error of law.

20. Ground 4 relates to the failure to take into account relevant evidence with regard to return, but as I have found that the findings about the Appellant's mental health cannot stand, the Judge's consideration of whether he will be able to return are founded on a misinterpretation of the facts.

21. As I stated at the hearing, I do not find that Ground 5 is made out given that at [48] the Judge found that the Appellant's medication was available in Bangladesh with reference to background evidence. There was no challenge to this finding.

22. In relation to Ground 6, this is not a protection claim. However, it is clear from my findings above that the Judge did not pay anxious scrutiny to the evidence before her.

23. I have carefully considered whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade. I have taken into account the case of Begum [2023] UKUT 46 (IAC). I have considered the

exceptions in 7(2)(a) and 7(2)(b). Given that the Judge erred in her assessment of the evidence, I consider that the extent of the fact-finding necessary means that it is appropriate to remit this appeal to be reheard in the First-tier Tribunal.

24. **Notice of Decision**

25. The decision of the First-tier Tribunal involves the making of material errors of law.

26. I set the decision aside. No findings are preserved.

27. The appeal is remitted to the First-tier Tribunal to be reheard de novo.

28. The appeal is not to be listed before Judge Chana.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
19 July 2023