IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002531

First-tier Tribunal No:
HU/54462/2021
IA/11302/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 22 February 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

MR MUHAMMAD IMRAN
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Waheed of Counsel instructed by Farani Taylor Solicitors
For the Respondent: Mr Whitwell Senior Presenting Officer

Heard at Field House on 11 January 2023

DECISION AND REASONS

1. To avoid confusion we shall refer to the parties as they were before the First-tier Tribunal, therefore the Secretary of State is once more the respondent and Mr Imran the appellant.

2. The appellant appeals with permission against the decision of First-tier Tribunal Judge French (the Judge) promulgated on 4 April 2022 dismissing his appeal against a decision of the respondent dated 29 July 2021 to refuse his application dated 6 November 2021 for leave to remain in the UK on the basis of his private life.

Anonymity

3. No anonymity direction was made by the First-tier Tribunal. There was no application before us for such a direction. Having considered the facts of the appeals including the circumstances of the appellant, we see no reason for making a such direction.

Background

4. The appellant is a national of Pakistan born on 1 January 1954. He arrived in the UK on a visitor's visa on 17 December 2004 and overstayed after the expiry of his visa.

5. On 25 November 2011, the appellant applied for leave to remain which was refused on 18 May 2012 with no right of appeal.

6. On 6 November 2020, the appellant applied for leave to remain on the basis of his private life in the UK. This application was refused by the respondent in a decision dated 29 July 2021.

7. The appellant appealed the refusal of 29 July 2021 on the basis of his family in the UK as he claimed he has maintained close relationships with his brother and extended family members, and on the basis of his private life acquired during his lengthy stay in the UK and due to his mental health conditions detailed in the report dated 14 September 2020 from Dr Saddik, a clinical psychologist.

Refusal decision

8. The respondent in the decision dated 29 July 2021, which was reconsidered on 18 January 2022 (pursuant to the First-tier Tribunal's direction to review the appellant's case), was not satisfied that there are any very significant obstacles to the appellant returning to Pakistan under Paragraph 276ADE(1)(vi) or that there are any exceptional circumstances in this case.

First-tier Tribunal decision

9. Mr Johal of counsel appeared for the appellant at the First-tier Tribunal hearing. The Judge heard oral evidence from the appellant and his brother Mr Butt.

10. The Judge accepted the appellant had diabetes (for which he had not been prescribed any medication) and that the appellant had depression for which he was prescribed a low dose of Mirtazapine commencing sometime

after the respondent's refusal decision. However, the Judge did not find the psychologist's report to be reliable [20] for the following reasons:

a. It was requested privately rather than because of a referral by a G.P. [22(e)],

b. The letter of instruction was partly leading [4(b)],

c. Some of the comments in the report were inconsistent with other evidence [22(e)],

d. It was unlikely that the expert as a psychologist as opposed to a psychiatrist would have purported to make a diagnosis of PTSD and if there was such a diagnosis that the appellant would not have received treatment for it [22(e)].

11. The Judge found the appellant's account lacked credibility. The Judge did not accept that there would be any very significant obstacles to the appellant's return to Pakistan as he had lived there for the first 50 years of his life and his sister as well as his two children still live in Pakistan. The Judge did not accept that there were any serious or compelling family or other considerations that would make exclusion of the appellant from the UK to be undesirable or that the refusal of the appeal would constitute a breach of the Article 8 rights of the appellant.

12. The Judge dismissed the appeal.

13. The appellant appealed to the Upper Tribunal.

Permission to appeal

14. The grounds seeking permission to appeal make general criticisms of the structure of the Judge's decision and assert in summary as follows:

a. the Judge's reasoning concerning the psychologist's report were not open to him for the reasons detailed in the grounds, and

b. the Judge's analysis of whether the appellant would face very significant obstacles to his integration in Pakistan under paragraph 276ADE(1)(vi) of the Immigration Rules had failed to address the impact of the appellant's mental health conditions.

15. Permission to appeal was granted by First-tier Tribunal Judge Kudhail on 24 May 2022, who considered it arguable that the Judge erred in his approach to very significant obstacles.

16. The grounds upon which permission was granted were not restricted.

Rule 24 response and rule 25 reply

17. In her rule 24 response, dated 22 June 2022, the respondent opposed the appeal and submitted that the Judge had directed himself appropriately

and on a holistic assessment, the Judge gave clear reasons for finding the account of the appellant of very significant obstacles to lack credibility.

18. The respondent submitted that the reservations and limitations of the psychologist's report highlighted by the Judge are supported by HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC).

19. The respondent concluded that the grounds seek to place a different emphasis on the term 'unreliable' than that intended by the Judge and they are a challenge to the limited weight placed on the report as a reliable and accurate description of the appellant's issues as at the date of the hearing.

20. The appellant submitted a rule 25 reply, drafted by Mr Waheed. Unfortunately this had been uploaded to MyHMCTS (the online system used by the First-tier Tribunal) as opposed to being filed with the Upper Tribunal. Fortunately at the start of the hearing before us, Mr Waheed was able to provide the panel and Mr Whitwell with a copy of the rule 25 reply.

21. The rule 25 reply raises for the first time the Judge's claimed failure properly to address the impact of the appellant's vulnerabilities in his findings of fact, contrary to the Joint Presidential Guidance Note No. 2 of 2010 (PGN). We will return to the procedural implications of what effectively amounted to an additional ground of appeal below.

Upper Tribunal hearing

22. Mr Waheed adopted the grounds and the rule 25 reply and elaborated on the reply in his oral submissions.

23. He submitted that there is no reasoned basis for the Judge's conclusion that it was unlikely that a psychologist would make a diagnosis of PTSD rather than a psychiatrist.

24. Mr Waheed asserted that even if the Judge was correct to discount the appellant's diagnosis of PTSD, as the Judge had accepted the appellant suffers from and is medicated for depression, the Judge's failure to make adjustments at the hearing in accordance with the PGN and to apply this Guidance to the assessment of the appellant's evidence vitiated his assessment of the appellant's evidence.

25. Mr Waheed submitted that the Judge should have treated the appellant's evidence with caution in accordance with the Guidance. Mr Waheed stated that the appellant was wrong to say he had not been referred to mental health services when the evidence included a copy of the Gateway Adult Mental Health Referral Form dated 14 December 2021 (referral form). Mr Waheed acknowledged there was no evidence before the Judge that the appellant had received any treatment as a consequence of this referral.

26. Mr Waheed submitted that the Judge's criticism of the psychologist's report on the basis of the appellant's evidence, a person whom the expert

had assessed as having cognitive issues was harsh. He submitted the appellant's evidence should not properly be relied on to undermine the psychologist's report.

27. It was pointed out that the Judge's decision was promulgated before the publication of HA (Sri Lanka) and so his reasoning could not have relied on that authority but was his own distinct reasoning.

28. Mr Waheed tendered the report being privately obtained rather than through referral by a GP is not a reasoned basis on which to reject the report as many such reports in the Immigration and Asylum jurisdiction are privately funded and this is to be commended as it reduces the burden on the NHS.

29. Mr Waheed whilst accepting one aspect of the letter of instructions may be criticised for being given in a "closed manner" suggested that this was to help focus the psychologist's report on what was material. He submitted the Judge does not suggest the psychologist has failed to comply with her duty to the court. He submitted the report is from psychologist who is a professional and includes a declaration confirming the contents of the report are true to the best of her knowledge and belief. Accordingly in his view, although the criticism may justify a reduction in the weight attributed to the report it is not such that the report can be said to be "unreliable".

30. Mr Waheed submitted that the "No Data" entry on the referral form in relation to "Level of functioning – any cognitive deficits/learning difficulties/communication issues" and "Risk to self (suicide/deliberate self-harm/self-neglect)" were simply an indication that these areas had not been considered by the G.P., unlike the psychologist who had a broader picture of the appellant's mental health and had considered these areas. Mr Waheed pointed out the referral form was completed by the G.P. almost over a year after the psychologist's report and after the appellant had tried unsuccessfully to contact the counselling service.

31. Mr Whitwell on behalf of the respondent relied on the rule 24 response and whilst acknowledging the decision could have been structured better submitted the Judge had directed himself appropriately, he had identified all evidence including the submissions and the decision should be read as whole. Mr Whitwell submitted on a holistic reading of the decision, the Judge had given clear and cogent reasons for finding the account of the appellant of very significant obstacle to be less than credible.

32. Mr Whitwell submitted the challenge to the psychologist's report was one of weight. He referred to closing submissions of the presenting officer at the First-tier Tribunal which clearly challenged the weight to be given to the report as it stood in "isolation" from the other medical evidence. Mr Whitwell emphasised that Mr Waheed did not appear at the First-tier Tribunal hearing and the points made by him were not raised by Mr Johal who did appear at the First-tier Tribunal hearing on behalf of the appellant.

33. Whilst acknowledging that HA (Sri Lanka) was reported after the date of promulgation of the Judge's decision, Mr Whitwell averred the Judge has given reasons which are in line with HA (Sri Lanka).

34. As to disposal of the appeal in the event we find there to be an error of law, Mr Waheed said that the appeal should be remitted to the First-tier Tribunal for a fresh decision. Mr Whitwell indicated that in the event of an error of law he was neutral as to whether the appeal should be remitted to the First-tier Tribunal.

35. At the end of the hearing we reserved our decision.

The Law

36. The Presidential panel of the Upper Tribunal in SB (vulnerable adult: credibility) Ghana [2019] UKUT 00398 (IAC) provides the following guidance in relation to the effect of applying the PGN on assessing credibility of the evidence:

> "(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.
>
> (2) By applying the Joint Presidential Guidance Note No 2 of 2010, two aims are achieved. First, the judicial fact-finder will ensure the best practicable conditions for the person concerned to give their evidence. Secondly, the vulnerability will also be taken into account when assessing the credibility of that evidence.
>
> (3) The Guidance makes it plain that it is for the judicial fact-finder to determine the relationship between the vulnerability and the evidence that is adduced."

37. Sufficient reasons for decision must be given; mere statements that a witness was not believed are unlikely to be sufficient MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC). The Upper Tribunal in MK gives the following guidance:

> "(1) It is axiomatic that a determination discloses clearly the reasons for a tribunal's decision.
>
> (2) If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons."

38. Henry LJ in Court of Appeal in Flannery - v - Halifax Estate Agencies [2000] 1 All ER 373 made the following general comments on the duty to give reasons:

> "(1) The duty is a function of due process and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties - especially the losing party - should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know …… whether the court has misdirected itself and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not"

Decision on error of law

Preliminary procedural points:

39. We deal first with three preliminary procedural points. Firstly, although the judge's claimed failure to apply the (PGN) was not an express ground of appeal, there was no resistance from Mr Whitwell on procedural grounds to the submissions being advanced. The impact of the appellant's mental health conditions on his prospective return to Pakistan lay at the centre of the grounds of appeal, as did the judge's claimed failure to take those factors into account in his assessment of very significant obstacles. We do not, therefore, consider Mr Waheed's submissions in this respect to be so far removed from the basis upon which the appellant enjoys permission to appeal to refuse to consider them. In any event, it is likely to be a 'Robinson obvious' error for a Judge to fail to consider the potential impact of an appellant's mental health conditions or vulnerability on their evidence and the other issues in the case, so we permitted Mr Waheed to advance those arguments.

40. Secondly, Mr Waheed's submissions regarding the PGN focussed primarily on the Judge's analysis of the appellant's evidence. It was not said that there were reasonable adjustments which were sought or necessary that the Judge failed to make. We note that the appellant was represented by counsel before the First-tier Tribunal and there was no suggestion that counsel raised any such concerns with the Judge at the time.

41. Thirdly, although it is alleged that the judge's findings were procedurally unfair, as it is said that the Judge reached a finding that the psychologist's report was "unreliable" without this being put to the appellant or counsel, there is no evidence before us concerning the conduct of the judge at the hearing. No witness statement from counsel, pursuant to BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC), nor had there been an application for a transcript of the hearing (Elais (fairness

and extended family members) [2022] UKUT 300 (IAC)). Further, we note that the disputed issues were identified by the parties, in particular by the respondent's supplementary decision dated 18 January 2022, and the weight to be attached to the medical evidence was a central issue between the parties (AM (Fair hearing) Sudan [2015] UKUT 656 (IAC), headnote at (v)). This is not a case where the Judge resolved the issues on a basis not ventilated between the parties.

42. The Judge records the presenting officer before the First-tier Tribunal as having submitted that the psychologist's report stood in "isolation" in that there was no other medical evidence to suggest the appellant had significant mental health problems at [17]. The reality is that, in reaching the findings he did concerning the appellant's medical report, the Judge was merely adopting the submissions that had been advanced by the respondent. We turn below to consider whether the Judge was entitled to approach matters in that way, but from a procedural fairness perspective, it is difficult to see how this was unfair.

43. Before proceeding to consider the grounds in detail, we remind ourselves of the many authorities on the approach an appellate court or tribunal should take when considering findings of fact reached by a first instance judge. A recent summary of the well settled principles can be found in Volpi & Anor v Volpi [2022] EWCA Civ 464 at [2] where Lewison LJ stated:

> "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
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> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced

> consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

44. We appreciate that judicial restraint should be exercised when examining the reasons given by the First-tier Tribunal Judge for his decision and that we should not assume too readily that the Judge misdirected himself just because not every step in his reasoning is fully set out. This is the guidance given by the Court of Appeal at paragraph [77] of KM v SSHD [2021] EWCA Civ 693.

45. The grounds criticise the structure of the decision. We acknowledge it may have been helpful for the Judge to focus his findings in one section within the decision, but the decision should be read as a whole and our analysis looks at the substance of the decision not the form. That the Judge peppered his reasoning throughout the decision by means of commentary on the evidence at various points simply underlines the fact that the judge's operative reasoning is to be ascertained by reading the decision as a whole, without compartmentalising it.

Ground one:

46. The gravamen of this challenge to the Judge's findings is that his analysis of the psychologist's report was flawed. Bearing in mind the appellate restraint with which trial judges' findings of fact should be approached, we accept Mr Whitwell's submission that, properly understood the appellant's appeal is a disagreement as to the weight attributed to the report by the Judge and does not demonstrate an error of law. That Mr Waheed acknowledged the Judge's criticism of the instructions to the expert as being partly leading was a matter which properly affects the weight attributable to the report emphasises the point.

47. The Judge at [20] finds the psychologist's report to be "unreliable" as there was independent medical evidence that the appellant had diabetes and depression and because of the reasons given at [22(e)] but not of PTSD or suicide risk. As stated in the rule 24 response the Judge did not use the term "unreliable" as meaning the report was a forgery or that the author had invented the diagnosis but in the light of the other medical evidence including G.P records and on considering the evidence as a whole, the Judge attributed little weight to it. Moreover the Judge had the benefit of "a sea of evidence" (to adopt the terminology of *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]) upon which he found the appellant's claimed risk of harm if returned to Pakistan not credible; yet the psychologist treated the appellant's narrative as true in concluding that the appellant is suffering from moderate PTSD as measured on interview and via a questionnaire without the benefit of an overview of the

evidence enjoyed by the Judge. On the evidence the finding of the Judge as to the psychologist's report was open to him and the reasons given for the finding are in our view adequate.

48. The Judge's criticism that the report was obtained privately rather than on referral from his G.P. would not in our judgment of itself be sufficient reason to find the report "unreliable". However that criticism must be viewed in the context of the judge's findings in the round, and the appellant's solicitors leading questions to the psychologists that "presupposed" the answer they sought and did not seem to invite an objective assessment as identified by the Judge [4(b) and 22(e)]. In addition we observe that , although the appellant had registered with the G.P. surgery on 28 July 2020 yet the G.P. records do not record any significant medical presentation at the time of the psychologist's report (14 September 2020); the concern of the Judge was that the appellant appeared to be more concerned with commissioning a report for the benefit of these legal proceedings, than seeking medical care. It was against that backdrop that the report being privately commissioned acquires significance, such that this reasoning open to the Judge.

49. The grounds challenge as perverse or a failure to give adequate reasons, the Judge's findings that the psychologists report is "unreliable" based on the psychologist's conclusion as to suicide/self harm which is said to be at odds with the view of the G.P. The psychologist's report was produced in September 2020 whereas the G.P. records were printed on 16 November 2021, the G.P. letter of the 4 January 2022 responding to a request from the appellant's solicitor for a medical report makes no mention of such a risk and the referral form (dated 14 December 2021) simply records "No Data, nil currently" in response to information as to "Risk to self (suicide/deliberate self -harm/self -neglect". Contrary what is asserted in the grounds, the G.P report of 4 January 2022 is not a report of the appellant's presentation and conditions as 4 January 2022 but is summary of the appellant's health records, obtained at the request of the appellant. It is of note that the appellant has been registered with the G.P. from 28 July 2020. In that time, the appellant had seen the GP on a number of occasions. It is likely that the G.P. records provide a broader picture of the appellant's medical conditions than the psychologist was able to glean during their video consultation. On this basis the Judge, whilst accepting the appellant was being treated for depression, was entitled to take into account an absence of any diagnosis or treatment for PTSD. It is against this background that the Judge finds the psychologist's report to be at odds with the G.P. This is a finding the Judge was entitled to make on the evidence and accords with the guidance at paragraphs 4 & 5 of the headnote in HA (Sri Lanka) albeit that HA (Sri Lanka) was promulgated after the Judge's decision.

50. There is criticism in the grounds that the Judge entirely failed to make a finding on the corroboratory evidence of the appellant's brother (Mr Butt) who confirmed the appellant's mental health difficulties and that he assisted the appellant with his medication. It is important to keep in mind

the role of the decision which is to identify the crucial legal points and to give reasons for the decision it does not need to deal with every particular evidential point relied on as acknowledged by Lewison LJ in Fage UK Ltd [at 115 and 116]. The same applies to the challenge in the grounds to "the brief reference to medical facilities being available in Pakistan [22(e)]. The Judge gives sufficient reason for his findings, and we reject Mr Waheed's submission requiring a "counsel of perfection" from the decision.

Ground two:

51. The grounds aver the Judge failed at [22(c)] to factor in the appellant's mental health issues when assessing the very significant obstacles test in 276ADE(1)(vi). Reading the decision read as a whole, the reasons given at [22(e)] which we have found were open to the Judge, were clearly in the Judge's mind and the appellant's mental health issues as identified in the psychologist's report would not have led to a different approach or outcome.

52. There is no suggestion the Judge failed to take into account the appellant had depression. Mr Waheed submitted the answer given by the appellant [13] was at odds with the evidence that he had been referred for mental health treatment and the Judge should have recognised this inconsistency and given him the opportunity to address him on it or not held the point against him. We accept that by the time of the hearing the appellant's G.P. had completed the referral form but as accepted by Mr Waheed there was no evidence before the Judge that any treatment had commenced. It is not clear whether the appellant meant that the G.P. had not referred him, or whether he had not started to receive any treatment pursuant to the referral. The appellant was represented by counsel at the First-tier Tribunal hearing who would have been well placed to ensure that the appellant understood this question by reference to the evidence before the Judge. There is no suggestion that there was any perception of a misunderstanding at the time. This highlights a classic problem of seeking to challenge findings of fact on appeal, and a reason why appellate courts and tribunals adopt a deferential approach to trial judge.

53. The Judge had been referred to the PGN in the appellant's skeleton argument. There is no criticism of his conduct during the proceedings. The high watermark of Mr Waheed's criticism of the Judge's failure expressly to refer to it is, properly understood, a minor disagreement with an expression used by the Judge in his reasoning. The Judge would have had the guidance in his mind and was clearly aware of the appellant's depression. In reality, the depression experienced by the appellant was relatively minor, and attributable to his immigration status (see the GP notes). Nothing turns on the Judge not expressly referring to the PGN or the appellant's mental health conditions in the assessment of his credibility. There was nothing in the evidence before the Judge that would have required him to treat the evidence of the appellant any differently.

54. We conclude that what is said in Volpi &Anor [at 65] applies equally to the application before us in that:

> "This appeal demonstrates many features of appeals against findings of fact:
>
> i) It seeks to retry the case afresh.
>
> ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called "island hopping").
>
> iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.
>
> iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.
>
> v) It concentrates on particular verbal expressions that the judge used rather than engaging with the substance of his findings."

Notice of Decision

55. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. We do not set aside the decision.

56. The decision to dismiss the appeal stands.

Signed N Haria **Date 26 January 2023**
Deputy Upper Tribunal Judge Haria