IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000664
First-tier Tribunal No:
PA/55969/2021
IA/17834/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22 June 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE STOUT

Between

SS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr N Paramjorthy of Counsel, instructed by S Satha & Co Solicitors
For the respondent: Mr D Clarke, a Senior Home Office Presenting Officer

Heard at Field House on 26 May 2023

DECISION AND REASONS

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) the Tribunal has ORDERED that no one shall publish or reveal the name or address of SS who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.

Any failure to comply with this direction could give rise to contempt of court proceedings.

Decision and reasons

1. The appellant appeals against the decision of the First-tier Tribunal (Judge Young-Harry) (FtTJ) following a hearing on 15 September 2022 dismissing his appeal against the respondent's refusal of his asylum claim, humanitarian protection claim and claim that his removal would breach his rights under Articles 3 and 8 of the European Convention on Human Rights (ECHR).

2. The appellant is a vulnerable person and is entitled to be treated appropriately, in accordance with the Joint Presidential Guidance No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance.

Background

3. The appellant is an Indian national who entered the UK on 2 August 2010 on a visit visa valid for 6 months. He claimed asylum on 3 July 2019 and the respondent refused his application by decision dated 9 December 2021.

4. His claims for asylum/humanitarian protection were based on a claimed fear of persecution by the Indian government for journalistic activities in 2009, and a period of 60 days of arrest when he claims he was physically ill-treated and tortured by the authorities while in custody.

5. Dr Dhumad (Consultant Psychiatrist) who prepared a psychiatric report on the appellant following consultation in January 2022 diagnosed the appellant as suffering from depressive disorder and PTSD arising from the claimed treatment while in custody in 2009.

6. Dr Dhumad's report also contains the following regarding suicide risk:

> 16.6 I have assessed the risk of suicide in his case; there are risk factors such as Depression, PTSD and hopelessness, there are also protective factors such as; he has supportive uncle in the UK, and he thinks of his mother in India. The overall risk at present is moderate but likely to be significant if he were to be deported or informed of such decision. Hopelessness and PTSD symptoms increase the risk of suicide in the context of removal to India, therefore the risk in my opinion would be high if threatened with removal. Hopelessness has a serious and significant association with suicide risk. The risk will be greater when he feels that the deportation is close, and any threat of removal, in my opinion will trigger a significant deterioration in his mental suffering and subsequently increases the risk of suicide.
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> 16.7 The recommended treatment for his condition according to the National Institute for Health and Care Excellence, is a combination of both trauma focused Cognitive behavioural therapy and medication; he is on Sertraline 200mg (antidepressant on maximum dose), and has been under the care of mental health services, however he remains unwell, therefore I recommend a referral for psychological therapy for trauma focused CBT. In my opinion, he is not receiving the recommended treatment, and his condition is very unlikely to progress further

> without a safe resolution of his fear. Therefore, in my view, he is very likely to suffer a serious deterioration in his mental health if he were to be returned to India and this is not a course that I would recommend.

7. It also goes on to express the opinion that the appellant is not fit to fly or fit to give evidence.

First-tier Tribunal decision

8. The FtTJ accepted the appellant's account of what happened to him in India, but held that he had failed to show, to the requisite low standard, that he had a well-founded fear that he would be persecuted on return to India. His claims to refugee status and/or for humanitarian protection accordingly failed.

9. As to the appellant's evidence regarding his mental health, the FtTJ referred at [13]-[15] to the report of Dr Dhumad, including noting at [13] that *"the doctor states the appellant has attempted suicide on a number of occasions"*. At [15], the FtTJ recorded that he accepted Dr Dhumad's opinion that the appellant was not fit to give evidence and stated that he 'attached weight to the medical report provided' and stated that he accepted *"the appellant's symptoms are consistent with the appellant experiencing some traumatic event while in India"* and that "*based on the medical evidence, the appellant struggles with recollection, and this may explain some of the inconsistencies in his evidence"*.

10. As to the appellant's claim that his *"mental health issues"* meant that return to India would breach his rights under Articles 3 and 8 of the ECHR and therefore the respondent's obligations under s 6 of the HRA 1998, the FtTJ concluded as follows:

> 23. In relation to the appellant's mental health challenges, I do not find he has provided sufficient evidence to show they meet and surpass the Art 3 health threshold. I find the appellant can be assisted with the necessary medical attention, assistance and medication on his return to India and can continue to receive treatment on his arrival, given they have a functioning health system.

11. The FtTJ then went on at [24]-[26] to consider the appellant's private life claim more generally in relation to friendships and connections formed in the UK, and concluded that the public interest in the maintenance of immigration control outweighed the appellant's Article 8 rights, taking account in that balancing exercise of the *"extensive use"* the appellant had made of the NHS and the fact that there was *"no evidence … that he paid for the treatment he received"*.

Permission to appeal

12. Permission to appeal was sought on all grounds, but granted by Upper Tribunal Judge Canavan on 17 April 2023 solely on the human rights ground that it was arguable that the judge failed to make adequate

findings relating to the medical aspects of the case in light of Dr Dhumad's assessment relating to suicide risk and the GP records indicating some history of attempted self-harm and referral for psychological treatment. Mr Paramjorthy did not seek to widen that grant of permission today.

The parties' submissions

13. The parties kept their submissions brief and so I do not set them out separately, but deal with their submissions as part of my legal analysis and decision.

Legal analysis and decision

14. A case brought on human rights grounds based on a person's medical condition or risk of suicide is one that comes within the '*N* paradigm': see *N v SSHD* [2005] UKHL 31; [2005] 2 AC 296 and *N v United Kingdom* 26565/05 [2008] ECHR 453 (27 May 2008); (2008) 47 EHRR 39. The European Convention on Human Rights does not place an obligation on a host state to refrain from removal where the feared harm does not emanate from intentionally inflicted acts of the public authorities in the receiving state, but instead from a naturally occurring illness, save in the most exceptional circumstances of the kind faced by the applicant in the case of *D v UK* (1997) 24 ECHR 25, who was in the final stages of a terminal illness facing a distressing death without family or other support in the receiving state, that compelling humanitarian considerations were found to engage the operation of Article 3.

15. The extent to which there might be 'other very exceptional cases' beyond those of the deathbed scenario identified in *D* has been the subject of ongoing consideration by the courts. A series of decisions have clarified the approach in such cases. Those decisions include *Paposhvili v Belgium* [2017] Imm AR 867, *AXB v SSHD* [2019] UKUT 397 (IAC), *AM (Zimbabwe) v SSHD* [2020] UKSC 17; [2021] AC 633, and *Savran v Denmark* [2021] ECHR 1025. This culminated in a recent distillation of the authorities by the Upper Tribunal in *AM (Art 3; health cases) Zimbabwe* [2022] UKUT 00131 (IAC).

16. At [22]-[25] the Upper Tribunal held:-

> 22. It follows that in Article 3 health cases of this nature, the following questions must be answered in relation to the initial threshold test. First, has the applicant discharged the burden of establishing that he or she is a seriously ill person? This is a relatively straightforward issue and will generally require clear and cogent medical evidence from treating physicians in the UK.
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> 23. The second question is multi-layered. Has the applicant adduced evidence "capable of demonstrating" that "substantial grounds have been shown for believing" that as "a seriously ill person", he or she "would face a real risk":

> [i] on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment,
>
> [ii] of being exposed
>
> [a] to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering, or
>
> [b] to a significant reduction in life expectancy?

24. In relation to [ii][a] above, it bears highlighting that it is insufficient for applicants to merely establish that their condition will worsen upon removal or that there would be serious and detrimental effects. What is required is "intense suffering" for the applicant – see [143] of Savran.

25. As set out above, it is for the applicant to adduce evidence capable of demonstrating substantial grounds for believing that he or she would be exposed to a real risk of [a] a decline in health resulting in intense suffering or [b] significant reduction in life expectancy. The nature and extent of the evidence that is necessary will depend on the particular facts of the case.

17. Mr Clarke also referred me to [31] of *AM (Zimbabwe)* [2020] UKSC 17 for further guidance as to what is meant in the authorities by a 'significant' reduction in life expectancy:

> 31. It remains, however, to consider what the Grand Chamber did mean by its reference to a "significant" reduction in life expectancy in para 183 of its judgment in the Paposhvili case. Like the skin of a chameleon, the adjective takes a different colour so as to suit a different context. Here the general context is inhuman treatment; and the particular context is that the alternative to "a significant reduction in life expectancy" is "a serious, rapid and irreversible decline in … health resulting in intense suffering". From these contexts the adjective takes its colour. The word "significant" often means something less than the word "substantial". In context, however, it must in my view mean substantial. Indeed, were a reduction in life expectancy to be less than substantial, it would not attain the minimum level of severity which article 3 requires. Surely the Court of Appeal was correct to suggest, albeit in words too extreme, that a reduction in life expectancy to death in the near future is more likely to be significant than any other reduction. But even a reduction to death in the near future might be significant for one person but not for another. Take a person aged 74, with an expectancy of life normal for that age. Were that person's expectancy be reduced to, say, two years, the reduction might well—in this context—not be significant. But compare that person with one aged 24 with an expectancy of life normal for that age. Were his or her expectancy to be reduced to two years, the reduction might well be significant.

18. It is clear from *AXB v SSHD* [2019] UKUT 397 (IAC) at [91]-[104] that the same test applies in suicide cases. The burden is on the appellant to show that the high threshold of 'real risk' of being exposed to a 'serious, rapid and irreversible decline in his or her state of health resulting in intense suffering' or 'a significant reduction in life expectancy' is met. If that is established then the burden shifts to the respondent to counter that evidence, if appropriate by obtaining specific assurances as to how the

appellant will be safeguarded on return: *AXB* ibid at [112]-[117] and [125] and *AM (Art 3; health cases) Zimbabwe* [2022] UKUT 00131 (IAC) at [17].

19. I observe, however, that suicide risk can raise somewhat different issues to other types of health case, because it is not a 'simple' question of considering what the health issue is, what treatment is required, whether that treatment is available in the return country and, if not, whether the consequences will meet the Article 3 threshold. Consideration of whether a suicide risk meets the Article 3 threshold will entail consideration of the nature and extent of the risk; thus, a risk that is not at a particularly high level of likelihood and/or a risk of an ineffective suicide attempt may be less likely to meet that threshold, whereas a high level of risk of an effective suicide attempt would be more likely to meet the threshold unless sufficient health care was available to provide assurance to the requisite standard that the risk will not eventuate. That last question is not one that is necessarily answered by considering general levels of healthcare: suicide prevention may require specific assurances about the care that the particular individual will receive, as the case law I have referred to indicates.

20. In this case, Mr Clarke accepted that the FtTJ did not direct himself by reference to any of the well-known authorities I have set out above, but reminded me that the Upper Tribunal should not assume simply because an authority is not mentioned or a step is omitted from a judge's reasoning that an error of law has been made. He referred to [72] of *HA (Iraq)* [2022] UKSC 22 where Lord Hamblen giving the judgment of the court observed:

> 72. It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:
>
> (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
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> (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.
>
> (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope.

21. I accept that the FtTJ's failure to refer to any of the relevant case law does not itself constitute an error of law. It remains the case, however, that a Tribunal must in its judgment deal with all material elements of the parties' cases and give sufficient reasons for its conclusions to enable the parties to know why they have won and lost (cf *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605).

22. In this case, the FtTJ failed to do that. In reciting the elements of Dr Dhumad's report, the FtTJ referred to the appellant's past attempts at suicide, but made no reference at all to Dr Dhumad's assessment of his current suicide risk. That was the central plank of the appellant's Article 3 case and the failure to address it is an error of law. I do not consider what the FtTJ says at [23] can be read as him addressing suicide risk. It is in the most general terms. There is no analysis at all either of the nature and extent of the suicide risk posed by the appellant, or of what services might be available to the appellant in the UK or India to meet that risk. The point is simply not dealt with. That is an error of law.

23. Alternatively, if, as Mr Clarke contends, the FtTJ is to be taken to be dealing with the appellant's suicide risk at [23], then in my judgment the reasons given are inadequate/perverse. In the opinion of Dr Dhumad, the appellant was at heightened risk of suicide in the UK if threatened with return to India. He was not, in Dr Dhumad's opinion, currently receiving in the UK the treatment necessary to address his mental health difficulties. It was no answer to this evidence of the appellant's suicide risk while in the UK if threatened with removal for the FtTJ to state, as the FtTJ did at [23], that the appellant 'can be assisted with the necessary medical attention, assistance and medication on his return to India'. To put it bluntly, medical care available in India will be of no use if his suicide risk eventuates prior to removal. And it cannot be assumed that there is adequate provision in the UK to prevent the suicide risk – and certainly not in this case where the only medical evidence (from Dr Dhumad) was that the appellant is currently <u>not</u> receiving adequate provision. Accordingly if, as Mr Clarke submits, the FtTJ was dealing with the appellant's suicide risk at [23], the reasons given for finding the Article 3 threshold not to be met were perverse and inadequate.

24. I add this further point which will need to be considered when this case is remade: the only evidence before the FtTJ as to medical provision in India was that set out in the respondent's decision letter. However, that does not specifically deal with suicide risk and how that is managed. There is therefore in this case an evidential gap which both parties may need to consider how to remedy, having regard to the authorities identified in this judgment which make clear that the initial burden of showing breach of Article 3 (i.e. both the requisite risk to health and the absence of appropriate treatment) is on the appellant, but then shifts to the respondent.

Disposal

25. For these reasons, I find that the FtT erred in law and the decision in relation to the appellant's Article 3 human rights claim (but not his asylum or humanitarian protection claims) must be set aside.

26. Paragraphs 7.2 to 7.3 of the Senior President's Practice Statement 2012 provides:

> 7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make
> the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier
> Tribunal; or
> (b) the nature or extent of any 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.
>
> 7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.

27. In this case, the parties were agreed that if I found an error of law, there would need to be relatively extensive fact-finding. The appellant's medical evidence is now out of date. It will need to be updated, and there may need to be further evidence from the appellant or the respondent as to how any suicide risk will be dealt with either in the UK or India. In those circumstances, it is not appropriate to remake in the Upper Tribunal. The case must be remitted for redetermination by a different judge.

Notice of Decision

The decision of the First-tier Tribunal in relation to the appellant's Article 3 human rights claim (but not his asylum or humanitarian protection claims) must be set aside.

The case is remitted to the First-tier Tribunal for redetermination by a different judge (not FtTJ Young-Harry).

The anonymity directions continue to apply.

Signed H Stout Date: 13 June 2023

Deputy Upper Tribunal Judge Stout