Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-000413
PA/02384/2020

THE IMMIGRATION ACTS

Heard at Field House
On 10 October 2022

Decision & Reasons Promulgated
On 7 November 2022

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MC (BY HER LITIGATION FRIEND, BR)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of her family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

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For the appellant: Ms U Miszkiel, Counsel, instructed by KT Solicitors
For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Mulholland ("the judge"), promulgated on 22 June 2021 following a remote hearing on 24 May 2021. By that decision, the judge dismissed the appellant's appeal against the respondent's decision, dated 24 February 2020, refusing her protection and human rights claims.

2. The appellant is a citizen of India. In essence, her claim involved the following elements: (i) that she was at risk on return to India because of an imputed political opinion, which in turn was connected to the activities of her husband; (ii) that she was in fact stateless; (iii) that she had committed adultery (which had resulted in two terminations) and would be at risk for that reason alone; (iv) that she suffered from very poor mental health; (v) that the combination of (i)-(iv) would place her at risk in her home area and that internal relocation would be unduly harsh; (vi) return to India would violate Articles 3 and 8 ECHR.

The decision of the First-tier Tribunal

3. Medical evidence was provided before the judge in the form reports by Dr Halari, Consultant Clinical Psychologist, together with GP medical records. Dr Halari was of the opinion that the appellant suffered from depression and PTSD, lacked capacity to instruct solicitors, and was unfit to give evidence. In light of the report, the appellant was not called to give evidence, nor had a witness statement been taken from her.

4. The appellant's current Litigation Friend, BR, had apparently acted in the same capacity in the proceedings before the First-tier Tribunal. It is not immediately clear to me as to whether any application had been made for her appointment, or, if it had, whether a judicial decision had been taken on it. In any event, this particular issue does not require further consideration in the appeal before me.

5. The judge directed herself to the relevant guidance on witness vulnerability, but noted that the appellant not in fact appearing as a witness: [17]-[19]. Nonetheless, the judge later confirmed that she was bearing the appellant's vulnerability in mind when considering credibility: [46].

6. Having conducted a thorough assessment of the medical evidence, the judge concluded that there were material deficiencies in Dr Halari's reports, specifically in light of what was, and was not, contained in the GP medical records. For the purposes of this appeal, two paragraphs in particular are relevant. At [39], the judge observed that:

> "The Appellant did not take part in the hearing or file a witness statement. She has therefore failed to explain why of suffering from flashbacks, hyper arousal, delusions, auditory hallucinations and/or psychosis with her GP and or why the many people who have assisted her and continue to assist her in the UK have not mentioned it."

7. At [45], the judge found as follows:

> "Having considered all of the information before me, individually and in the round, I am not satisfied that Dr Halari has provided a sufficiency of information within the report to justify her conclusions that the Appellant cannot instruct a solicitor and take part in the hearings. There are fleeting references to forgetfulness and memory impairment within the GP records however her GP has not referred her to psychiatric or psychological services for further consideration and there is no mention of delusions, psychosis, flashbacks and hypervigilance. The appellant has been inconsistent about her suffering and whilst I accept that she is a vulnerable witness, to the extent that she suffers from depression, anxiety and PTSD, I am not satisfied that these conditions would cause her not to mention her suffering in this way to the Respondent in 2010 when she was interviewed by Dr Halari. I find that the Appellant has PTSD and depression…but I do not accept that she has delusions, psychosis or hallucinations."

8. The judge went on to give further consideration to the appellant's evidence and whether any mental health symptoms had been a cause for inconsistencies in the evidence and whether there had been any explanation for the appellant's failure to have mentioned certain symptoms to her GP or other individuals: see, for example, [55]-[65]. The judge found against the appellant's credibility.

9. The judge then considered the various elements of the appellant's protection and human rights claims. These were all rejected. The conclusions relating to imputed political opinion and statelessness have not been the subject of challenge and I need not consider them in this appeal. As regards the adultery issue, the judge found that the absence of an illegitimate child was relevant, as was the lack of evidence to show that anyone did, or would, know about the terminations. The judge took the view that it was "possible" that the appellant's husband could be in the United Kingdom: [78]- [79]. The judge found that the appellant would not be returning to India as a lone woman. Even if she were, the judge concluded that there would be no risk of persecution: [80]-[88].

10. Articles 3 and 8 were then addressed. The judge concluded that neither provision assisted the appellant.

The grounds of appeal and grant of permission

11. The grounds of appeal are, with respect, very lengthy and not altogether easy to digest. In essence, they seek to challenge all aspects of the judge's decision, save for the conclusions on the imputed political opinion and statelessness.

12. In the context of my ultimate conclusions in this appeal, the most pertinent of the five grounds put forward is the first, by which it was asserted that the judge acted with procedural unfairness by concluding that the appellant did not lack capacity, without bringing that significant concern to the attention of the parties prior to the promulgation of her decision. It was said that this adverse finding infected the overall assessment of credibility and was, in all the circumstances, a material error of law.

13. Permission to appeal was granted by the First-tier Tribunal on all grounds.

Procedural history

14. The error of law hearing was originally listed before a panel of the Upper Tribunal comprising Mrs Justice Hill and Upper Tribunal Judge Norton-Taylor. At that hearing, the panel expressed its concern as to whether the appellant had capacity to instruct legal representatives in the proceedings before the Upper Tribunal and, if appropriate, whether a Litigation Friend had been, or should be, appointed to act on the appellant's behalf. The hearing was adjourned, with directions.

15. After some delay, those directions were complied with. A psychiatric report from Dr A Bashir, Consultant Psychiatrist at South West London and St George's NHS Trust was provided, together with an application for BR to be appointed as the appellant's Litigation Friend and a supporting witness statement from that individual.

16. The new medical evidence and the application were put before me. I granted the application for the appointment of BR as the appellant's Litigation Friend in the proceedings before the Upper Tribunal and admitted Dr Bashir's report. I was satisfied that the appellant's current solicitors were able to act on her behalf, through BR.

17. The hearing was then re-listed.

The hearing

18. Both parties agreed that the hearing could proceed in light of my case management decisions set out in paragraph 16, above.

19. Ms Miszkiel relied on the grounds of appeal and skeleton argument previously provided by another Counsel who had appeared at the adjourned hearing before the panel. She expanded on the grounds of appeal, submitting that the first two were interlinked: the judge acted unfairly in respect of the capacity issue and had then gone on, erroneously, to have held the absence of evidence on psychosis against the appellant when it had never been asserted that such a condition was being relied on. In respect of the other challenges, I need only record here Ms Miszkiel's submission that the judge had misinterpreted the country guidance decision in BK (Risk-Adultery- PSG) India CG [2002] UKIAT 03387 by appearing to require the existence of an illegitimate child.

20. Mr Whitwell relied on a skeleton argument provided previously. He emphasised that the appeal before the judge was not a dress rehearsal. The judge had been entitled to take account of the lack of information in the GP medical records. He did, however, accept if I were to conclude that the judge had acted unfairly in respect of the first ground of appeal, the decision as a whole probably could not stand and case should be remitted to the First-tier Tribunal.

21. It was submitted that the judge did not err in law by referring to psychosis. The appellant was seeking to make a distinction without a difference. The remaining grounds were addressed, with Mr Whitwell opposing the existence of any errors related thereto.

22. At the end of the hearing I reserved my decision.

Discussion and conclusions

23. Before turning to my analysis of this case I remind myself of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095, paragraph 19 of which states as follows:

> "19. I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is "on any point of law arising from a decision made by the [FTT] other than an excluded decision": Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), section 11(1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the

> decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in AH (Sudan) v Secretary of State for the Home Department at [30]:
>
> > "Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

24. Following from this, I bear in mind the uncontroversial propositions that the judge’s decision must be read sensibly and holistically and that I am neither requiring every aspect of the evidence to have been addressed, nor that there be reasons for reasons.

25. I am bound to say that this appeal has given me much pause for thought. It is quite apparent that the judge undertook a conscientious and thorough consideration of the issues in what was a multi-faceted case. In a number of respects, her decision cannot be faulted, or at least it cannot be said that she erred in law.

26. A judge is entitled to consider medical evidence in the round and this can include not simply medical reports provided for an appeal, but an individual’s history as shown through GP medical records: see, for example, HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC). The authors of medical reports should engage with GP medical records, where appropriate.

27. The judge rightly considered the appellant’s credibility in light of both the medical evidence and other considerations. She dealt with the various strands of the appellant’s case and provided, on the whole, legally adequate reasons.

28. There is, it is fair to say, a number of findings and conclusions which would, all other things being equal, lead me to conclude that the judge’s decision contains no errors of law.

29. However, notwithstanding the foregoing and the appropriate restraint required in onward appeals, I have concluded that the judge did err in a material sense.

30. The appellant’s representatives had in their possession an expert report from Dr Halari which clearly stated that their client lacked capacity and was unfit to give evidence. Notwithstanding certain deficiencies in the report, as subsequently identified by the judge having had regard to the entire evidential picture, I am satisfied that the representatives were entitled to proceed on the basis of the report, as it stood uncriticised prior

to the judge's decision. The effect of the report was that the representatives could not, as a matter of professional conduct, have taken a witness statement from the appellant, nor would they have been able to call her as a witness at the hearing.

31. Perhaps somewhat unusually, Dr Halari's report had been obtained in sufficient time to have provided it to the respondent in advance of the decisions to refuse the protection and human rights claims. The reasons for refusal letter noted Dr Halari's opinion that the appellant lacked capacity to instruct solicitors and was unfit to give evidence, expressly accepted that the appellant suffered from PTSD, and referred to Dr Halari's consideration of the appellant's claim to have suffered from hallucinations. There was no express criticism of the report as a whole, or to any of the matters referred to in this paragraph.

32. I accept that Dr Halari's report was not challenged by the respondent's representative before the judge and I also accept that the judge did not raise any concerns she had as to the reliability or sustainability of Dr Halari's opinions.

33. Whilst I can appreciate the difficult task faced by the judge (indeed, any judge) when having to grapple with a good deal of evidence in a multi-faceted appeal such as the present (perhaps only having had limited time to prepare in advance), I am satisfied that in the particular circumstances of this case there was procedural unfairness on the part of the judge. Clearly, there is no general obligation for a judge to raise each and every possible matter of concern with representatives at a hearing. The difference in the present case is that the concern (which ultimately resulted in adverse findings connected to credibility and risk on return) related to a crucial aspect of the evidential picture as a whole, namely the appellant's capacity or lack thereof. The judge found that the appellant did not in fact lack capacity and, on a fair reading of her decision, this had the consequential effect of materially undermining the appellant's credibility. In turn, the damaged credibility permeated into other aspects of the protection and human rights claims. I have quoted [39] and [45] of the judge's decision, above. These passages indicate, by way of example, the negative impact of the judge's conclusion on Dr Halari's report, as it related to the issue of capacity.

34. The appellant's complaint is that the judge should have raised a concern, either at the hearing, or after the hearing but before the decision was promulgated. It may well be that the concern only crystallised in the judge's mind after the hearing, at which point she would have likely been better appraised of the evidence as a whole. That fact does not, of itself, preclude the judge from raising the issue with the parties by way of, for example, directions, or even reconvening the hearing. There is force in the appellant's complaint.

35. Mr Whitwell's submission is also, to an extent, meritorious. Appeals before the First- tier Tribunal are not dress rehearsals and it is not appropriate for

judges to have to point out the weaknesses in a party's case in all circumstances.

36. Ultimately, and in the particular circumstances of this case, I accede to the appellant's primary argument under the first ground of appeal. It was procedurally unfair for the judge not to have raised a concern on the capacity issue, thereby not affording the appellant's representatives an opportunity to address that concern, by way of additional evidence or submissions. It is the case that additional medical evidence was in fact obtained, which supports Dr Halari's opinions on capacity. Whilst the evidence is certainly not incontrovertible, it does go to support the assertion that the judge's error was material.

37. Notwithstanding the other adverse findings made by the judge on a number of issues, the error I have identified could have made a difference to (i) the overall assessment of credibility and, in turn, (ii) the assessment of risk on return.

38. I therefore set the judge's decision aside on the basis of procedural unfairness.

39. For the sake of completeness, I address the second ground of appeal. At various points in the judge's decision, she referred to a lack of evidence to show that the appellant suffered from psychosis: see, for example, [30], [39], and [45]. The difficulty with this is that the appellant's case had never been put forward on the basis that she did suffer from psychosis. It therefore appears as though the judge had looked for evidence in support of a condition which had never been relied on and then wrongly held the absence of such evidence against the appellant. This constitutes an error of law. Seen in isolation, I would not necessarily regarded as being material, but taken cumulatively it does meet that threshold.

40. Finally, I am satisfied that the judge erroneously introduced a requirement that there be an illegitimate child when considering the country guidance case of BK. Although on its facts, the individual in that case did have a child, as I read the decision this was not a specific criteria. The point related to whether the individual was (or presumably, would be perceived as being) an adulterer.

Disposal

41. Both representatives were agreed that if I should find an error of law based on the procedural fairness challenge, this case would have to be remitted to the First-tier Tribunal for a complete re-hearing. That must be right. The assessment of credibility is a crucial element of this case and it has gone wrong. The case needs to be reconsidered afresh, with no preserved findings, save for:

    (a) the appellant suffers from depression and PTSD. This has not

been disputed by the respondent and the judge made a clear and sustainable finding on the point;

(b) the appellant is not stateless. The analysis and conclusions at [89]-[95] the judge's decision are clear sustainable, and not in any event been challenged.

42. It is certainly debatable whether the appellant would be able to make out and the Article 3 medical claim on remittal. However, I do not intend to constrain the First-tier Tribunal in that regard.

Anonymity

43. It is clearly appropriate to maintain the anonymity direction in respect of the appellant. This case involves protection issues. The medical issues are also a significant consideration.

44. Ms Miszkiel made an application for the appellant's Litigation Friend to be anonymised as well. This is on the basis that she lived together with the appellant and by way of so-called "jigsaw identification" the identity of the latter may be discovered by the identity of the former. In the particular circumstances of this case, I have granted that application for the reasons put forward at the hearing.

Notice of Decision

45. **The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

46. **I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.**

47. **I remit the case to the First-tier Tribunal.**

Directions to the First-tier Tribunal

1. This appeal is remitted to the First-tier Tribunal (Hatton Cross hearing centre) for a re-hearing on all issues, subject to what is said in this decision;

2. The remitted appeal shall not be heard by First-tier Tribunal Judge

Mulholland.

Signed: *H Norton-Taylor* Date: 12 October 2022

Upper Tribunal Judge Norton-Taylor