



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: PA/04898/2018

THE IMMIGRATION ACTS

**At Field House
On 4 February 2022**

**Decision & Reasons Promulgated
On 23 March 2022**

Before

**UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

Between

MR BS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E. Daykin, counsel instructed by Elaahi & Co
solicitors

For the Respondent: Ms Isherwood, Senior Presenting Officer

DECISION AND REASONS

**Direction Regarding Anonymity - Rule 14 of the Tribunal
Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The Appellant is a national of India, born on 1 November 1979. He arrived in the United Kingdom on 28 October 2002 and claimed asylum, however, he subsequently absconded and his application was refused on the basis of non-compliance on 29 March 2018. The Appellant then put forward a claim that he had been trafficked and on 10 October 2018 a reasonable grounds decision was made, followed by a conclusive grounds decision on 27 June 2019. On 16 January 2020, the Appellant's asylum claim was reconsidered and refused. The Appellant appealed against this decision and his appeal came before First tier Tribunal Judge Chana for hearing on 4 June 2021. In a decision and reasons promulgated on 28 June 2021, the Judge dismissed the appeal, both in relation to the Refugee Convention and on the basis of human rights.

2. An application for permission to appeal to the Upper Tribunal was made in time on 12 July 2021. The grounds in support of the application asserted that the Judge had erroneously failed to address the medical evidence in assessing the credibility of the Appellant's account and failed to make clear findings on core issues in the claim.

3. Permission to appeal was granted by First tier Tribunal Judge Boyes in general terms in a decision dated 4 October 2021.

Hearing

4. At the hearing before the Upper Tribunal Ms Daykin made submissions on behalf of the Appellant in line with the grounds of appeal. She submitted that, in terms of the overall assessment of credibility, the first ground is that the Judge appeared to accept that the Appellant suffers from mental health issues and should be treated as a vulnerable witness but then made negative credibility findings, seemingly without regard to the medical evidence and cognitive difficulties as a result of his mental health issues. Ms Daykin clarified that whilst Dr Rachel Thomas, Consultant Psychologist, had made clear at [83] that only if it was imperative for the Appellant to give evidence he should do so, there was an indication in the First tier Tribunal that there were questions for him to answer which was why he was put forward as a witness. Dr Thomas considered the appellant should be treated as a vulnerable witness and set out the parameters in her report. However, that did not thereafter take place in the Judge's assessment of the Appellant's credibility.

5. The Upper Tribunal drew Ms Daykin's attention to [61] of the Judge's decision and reasons. Ms Daykin submitted that the Judge's finding there, that the Appellant was distancing himself from his earlier evidence as he realised he could not be found admitting that he was a member of a terrorist organisation and demonstrated that the Appellant "*has the mental capacity to strategise his asylum claim*", was completely at odds with the medical evidence. The Judge did not explain how, in light of the

evidence and the Appellant's cognitive ability, he would be able to develop a high level strategy on his feet giving evidence before her.

6. Ms Daykin further submitted, whilst accepting that she had not set this point out in the grounds of appeal that at [68] the Judge records what was purportedly said to Dr Smita Joshi, a consultant psychiatrist and this founded quite an important part of the Judge's decision regarding the Appellant's family in India. The Judge understood the Appellant to have said to Dr Joshi speaking in Hindi that he was working to support his family in India and that he had lost his job. However, this cannot be found in Dr Joshi's report and it is simply not present. Ms Daykin drew the Upper Tribunal's attention to Dr Ghodasara, a doctor in the GP surgery at page 96 of the Appellant's bundle dated 26.4.18 at page 9 of 14, which provides: "*Seen with his brother who was translating*" The witness who is referred to as a brother, but is not a blood relative, is Mr Gurav Rajvansh. Ms Daykin submitted that the Judge's analysis of the case is fundamentally flawed and that nothing can be carved off and found to be safe.

7. With respect of her second ground of appeal, Ms Daykin submitted that there were clear issues about risk on return as set out in the Appellant's skeleton argument. Whilst it appears that [75] disposes of the case, it is unclear whether or not the Judge found the Appellant would be at risk of trafficking on return to India, despite the fact that the risk of re-trafficking was made out on the evidence and he would be facing a very vulnerable situation on return to India.

8. In her submissions on behalf of the Secretary of State, Ms Isherwood initially took the position that there was no material error in the decision, albeit she accepted that it was not the best decision. Ms Isherwood then accepted that the Judge had appeared to reach findings which were contrary to the medical evidence and that nowhere was it made plain in the actual analysis of the claim that she was aware of the Appellant's mental health difficulties and severe PTSD, despite previously accepting that he is a vulnerable witness. Ms Isherwood accepted that she was also in difficulty defending the decision in light of the absence of findings regarding risk on return, as set out in Ms Daykin's second ground of appeal.

9. We formally reserved the decision having sought the views of the parties as to disposal were we to find a material error of law in the Judge's decision and reasons. The parties agreed that in those circumstances the appeal should be remitted back to the First tier Tribunal for a hearing *de novo* because the errors went to the heart of the appeal.

Decision and reasons

10. We are grateful to Ms Isherwood for her pragmatic concession that the Judge made material errors of law in the decision and reasons. We agree.

11. With regard to ground 1 of the grounds of appeal, we find that the really critical point is that the Judge has not actually applied the medical evidence to an analysis of the inconsistencies and discrepancies in the Appellant's account, bearing in mind the comment of Dr Thomas at [83] where she opined:

"Only if it is imperative for Mr S to give further oral evidence, do I consider that this should be attempted due to the psychiatric risks to him of so doing and the likelihood that the quality of the evidence he would be able to provide under such duress, would be poor at best given his current mental health difficulties."

12. In Mibanga [2005] EWCA Civ 367 Buxton LJ held at [30]:

"30. ... The adjudicator's failing was that she artificially separated the medical evidence from the rest of the evidence and reached conclusions as to credibility without reference to that medical evidence..."

13. The judgment in *Mibanga* has been followed in a number of subsequent cases, including by Sir Ernest Ryder in AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 and recently in QC (verification of documents; Mibanga duty) China [2021] UKUT 00033 (IAC) where a Presidential panel of the Upper Tribunal held at [57]:

"57. To sum up, the judicial fact-finder has a duty to make his or her decision by reference to all the relevant evidence and needs to show in their decision that they have done so. The actual way in which the fact-finder goes about this task is a matter for them. As has been pointed out, one has to start somewhere. At the end of the day, what matters is whether the decision contains legally adequate reasons for the outcome. The greater the apparent cogency and relevance of a particular piece of evidence, the greater is the need for the judicial fact-finder to show that they have had due regard to that evidence; and, if the fact-finder's overall conclusion is contrary to the apparent thrust of that evidence, the greater is the need to explain why that evidence has not brought about a different outcome."

14. At [49] the Judge stated that she had treated the Appellant as a vulnerable adult in line with the Joint Presidential Guidance Note no.2 of 2010 and noted that he had been diagnosed as suffering from complex PTSD and a major depressive disorder. However, the Judge proceeded at [55] to find the Appellant not to be credible due to inconsistencies and plausibility issues in his evidence, without at any stage actually factoring in the medical evidence, particularly Dr Thomas' opinion as to the impact on him of giving evidence in light of his mental health diagnoses. The Judge outlined the medical reports at [69]-[73] and [80]-[82], concluding

at [74] and [83] that there was no objective evidence that the Appellant would be unable to receive treatment for his mental health in India but treated this evidence as going to risk on return only, rather than a composite part of her assessment of the credibility of the claim. Nor does she appear to have borne in mind the acceptance by the competent authority that the Appellant is a victim of trafficking.

15. Moreover, it is further clear that the Judge confused material aspects of the medical reports and medical evidence, in particular conflating the GP notes and the report of Dr Joshi, as submitted by Ms Daykin at [6] above. However, the Judge's confusion as to what was said to who and reliance upon an inaccurate note of what the Appellant apparently said more than three and a half years ago to a GP without the benefit of professional interpretation, cannot, in our view, form any proper basis for a finding that the Appellant is now in contact with family members in India.

16. The second ground of appeal is concerned with the failure by the Judge to make clear findings on the issues identified in the Appellant's skeleton argument, including whether the Appellant would be at risk on return on account of his religious and political beliefs and whether he would be at risk of being re-trafficked, whether there would be sufficiency of protection and whether there was an internal flight alternative, as well as whether Articles 3 and 4 of ECHR would be engaged by virtue of a deterioration in his mental health. Ms Daykin submitted that the Judge summarised the bases of claim at [50] [his father was involved with the Khalistan movement in the 80's, he was arrested and tortured by the Indian police force and he is a victim of trafficking] and at [52] accepted that the Appellant was a member of a particular social group *viz* victims of trafficking, but that she failed to go on to make findings on the core aspects of risk on return either on account of his political and religious beliefs or of being re-trafficked or exploited.

17. We find that this submission is made out and there are no findings in the Judge's decision and reasons on these key aspects of the claim.

DECISION

18. For the reasons set out above, we find that there are material errors of law in the decision of the First tier Tribunal Judge. We set that decision aside and remit the appeal for a hearing *de novo* before the First tier Tribunal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

18 February 2022