IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003356

First-tier Tribunal No: HU/02444/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 11th of December 2024

Before

UPPER TRIBUNAL JUDGE LANDES
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

USMAN MIR
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Fisher, Counsel instructed by Quality Solicitors A-Z Law
For the Respondent: Mr Parvar, Senior Home Office Presenting Officer

Heard at Field House on 6 November 2024

DECISION AND REASONS

Background

1. The appellant, a citizen of Pakistan, appeals with the permission of Judge Parkes against the decision of Judge Burnett promulgated on 9 June 2023 who dismissed the appellant's appeal against the respondent's decision of 9 January 2018 to refuse his human rights' claim made consequent on the respondent's decision to deport him.

2. The appellant came to the UK on 27 February 1991 when he was 14 months' old with his mother, who subsequently claimed asylum. Although her asylum claim was refused, the appellant obtained ILR on 10 March 2003 as a dependent of his mother. He first offended at the age of 17. The index offences were committed some years later, between June and August 2016 and were offences of robbery (x 4), attempted robbery (x 5) and possession of an imitation firearm whilst

committing an offence (x 3). The appellant was sentenced to a total of 6 ½ years' imprisonment in December 2016 and a decision was taken to deport him, and his human rights' claim refused.

3. The appellant appealed the refusal of his human rights claim, but the appeal was dismissed in April 2018. He appealed to the Upper Tribunal who found errors of law and, by decision promulgated in August 2019, remitted the appeal to the First-Tier Tribunal.

4. Judge Burnett set out in his decision from [8] onwards, some of the events which led to it taking 3 ½ years for the appeal to be heard again in the First-Tier Tribunal. It seems that between August 2021 and 27 March 2023 when Judge Burnett heard the appeal, there had been at least three adjournments of the hearing for reasons such as difficulties in obtaining a representative/changes of representative and awaiting legal aid funding. Meanwhile, although the appellant was released on licence in November 2019, he was recalled to prison in February 2020 for repeated breaches of approved premises' rules. He was not then at liberty until early February 2023, when he was released from immigration detention.

5. The appellant was in person at the hearing before Judge Burnett. He attended alone, saying that his representative had withdrawn due to no communication, and he was not able to obtain a representative [11]. His mother and sister who had assisted him in the past, were not present at the hearing, the appellant said because they did not want to proceed without a representative [12].

Claimed error of law

6. The appellant appealed himself. He said that he had only been released in February 2023 and was suffering with mental health challenges which was why a solicitor was unable to represent him at the hearing. He said he had been suffering with mental health problems since before going to prison and described those problems as being anxiety, depression, stress, paranoia, hallucinations, schizoid personality disorder, dissocial personality disorder, cognitive issues, PTSD, self-harming, insomnia and suicidal thoughts. He said that he had requested an adjournment, but this was not upheld, and he would like the opportunity to have a hearing with a representative and some extra time so that he could gather mental health evidence and instruct a solicitor.

7. Judge Parkes did not restrict the grant of permission. He also said that he could not see any consideration as to whether the appellant was to be treated as a vulnerable witness, and it was arguable on that basis that the judge may have erred.

8. In a Rule 24 response of 31 July 2023, the respondent opposed the application, maintaining that the judge was entitled to refuse the adjournment for the reasons given at [19]. Whilst accepting that the sentence that the appellant was to be treated as a vulnerable witness was not in the decision, it was averred that it was not material to the outcome as the judge was fully aware and considered the mental health of the appellant throughout the decision. It was said that the appellant had not provided up to date medical evidence and the judge had found at [50] that there had been no real change to the assessment made by Judge Bristow at the first hearing before the First-Tier Tribunal in 2018.

9. A skeleton argument settled by Ms Fisher was filed the day before the hearing with reference to documents in the appellant's bundle (which had not yet been filed). She relied on the case of Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC), saying that the judge did not have the psychiatric assessment of the parole board dated 18 July 2020 as he had so stated, and the section from the OASys report was rather misleading. She referred to a forensic psychological risk assessment of 18 March 2021 also directed by the parole board which highlighted the appellant's cognitive difficulties. She said that those medical reports were not referred to and given the appellant had a history of mental illness and was unrepresented the judge should have granted an adjournment so that he, as a vulnerable appellant, could have representation, and it was in the interest of fairness for the judge to ensure that he had access to all the medical reports which would clearly have been relevant to the fact finding on issues before him. The judge's finding that there was no real change to the assessment made by Judge Bristow in 2018 was not borne out by the evidence. Ms Fisher also referred to recent evidence which post-dated the judge's decision.

10. Ms Fisher also submitted that the judge's findings of fact were vitiated by the lack of consideration of the expert reports, which were relevant to obstacles to integration into Pakistan and may have led to a different conclusion on the facts and they were also relevant for the proportionality balance. The appellant's claim about his sexuality also was dismissed in a brief paragraph with little reasoning.

The hearing; submissions

11. A three-part bundle was filed on behalf of the appellant on the morning of the hearing. We were not able to read it before the hearing. Mr Parvar did not have the documents either and the second part of the three could not be emailed to him because it was too big. Having discussed what was in the documents, it appeared that it would be sufficient for Mr Parvar to be sent the first part of the bundle (which contained the new documents relied upon) as the documents in the second and third parts of the bundle were documents which had already been submitted to the respondent. We then appreciated that the OASys report in the appellant's bundle was not the OASys report before Judge Burnett. Mr Parvar had a copy of the OASys report before Judge Burnett and sent a copy to us and to Ms Fisher. We then adjourned so the relevant documents could be read.

12. When we resumed, we indicated to Mr Parvar that the psychological risk assessment of 18 March 2021, prepared for the parole board, indicated that the appellant was vulnerable and in particular had cognitive problems. We said that it seemed to us that if the judge had known that it was likely that he would have adjourned at least so that evidence could be obtained. Mr Parvar said that he wanted some time to think about his response.

13. When we resumed again Mr Parvar submitted that the appellant's former representatives had served a bundle, and the psychological assessment and psychiatric report prepared for the parole board were not within that bundle. They had both been produced for the first time this morning. He said that there was no application under rule 15 (2A) to produce that evidence; no doubt because it did not meet the Ladd v Marshall test. The judge had been aware that a psychiatric assessment and psychological assessment had been produced because he had referenced the OASys report [51] and he noted he had not seen the reports [53] and he had no expert medical report before him [52]. He said the judge was entitled, when refusing an adjournment, to bear in mind the issue

of resources and the time it had already taken to bring the appeal to a hearing. He referred us to the Supreme Court decision in R (on the application of Begum) v Special Immigration Appeals Commission [2021] UKSC 7 at [90] and reminded us that it said that proper consideration should be given to the position of the Secretary of State, not just that of the appellant, and that an appeal should not be allowed merely because an appellant found themselves unable to present their case effectively because that would be unjust to the respondent. He reminded us that the appellant was also relying on post decision evidence and that there had been no application to amend the grounds.

14. Ms Fisher asked us to admit the fresh evidence under Rule 15 (2A). She said that unbeknown to the judge there was further evidence post Judge Bristow's decision. The judge was not aware of that evidence, and it would have been prudent for him to adjourn for medical reports. That the appellant was vulnerable and unrepresented should have triggered alarm bells and so in the interests of fairness there should have been an adjournment.

15. We retired to consider whether to admit the fresh evidence relied upon under Rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. On return we announced that we would waive (under Rule 7 (2) (a)) the requirement to provide written notice under Rule 15(2A) and extend time for providing the evidence (as the legal officer's direction provided for the hearing bundle to be served by 1 November) and would admit the psychiatric report and psychological assessments prepared for the Parole Board and referred to in the OASys assessment completed on 3 August 2021. We did so because we considered it was necessary in the interests of justice to consider that evidence to ascertain whether the judge's refusal of the adjournment was fair.

16. We then explained, that having heard the submissions, we considered that it had been unfair not to adjourn the hearing to obtain those reports and to enable the appellant to try and obtain representation as, unbeknown to the judge, the OASYs report did not give the full flavour of the psychiatric report and psychological report and those disclosed additional vulnerabilities on the part of the appellant. We explained that we would give our full reasons in writing, but that the error of law meant that the decision would be set aside and the appeal remitted to the First-Tier Tribunal for rehearing. We set out our full reasoning below.

Discussion and analysis

17. The OASys report, which was before Judge Burnett, referred in a few places to the psychiatric and psychology assessments of 15 July 2020 and 18 March 2021, in the context of the appellant's mental health symptoms being related to drug misuse and personality disorder, rather than a serious mental illness. The part the judge has quoted at [51] is representative.

18. The OASys report does not mention any suggestion of learning disabilities or cognitive problems in those reports. In section 4 – education, training and employability (p 13 of 58) it indicates that the appellant has no problems with reading, writing or numeracy and has no learning difficulties. It is noted (p 14 of 58) that the appellant did receive some qualifications in prison. In the issues section (13) (p 27 of 58) learning difficulties and poor communication skills are not raised as an issue.

19. In fact, at the end of the psychiatric report, the psychiatrist notes that he did not come across any formal assessment of the appellant's intellectual abilities/cognitive function (p 41 report) and comments that unless the appellant's cognitive abilities are understood and taken into account, they may limit his ability to learn and retain information pertinent to risk reduction and management. The psychiatrist recommended that prison psychological services conduct a formal assessment of the appellant's cognitive function/IQ and a full assessment of his personality so that a comprehensive risk formulation could be completed.

20. The psychological assessment makes clear that its context was the parole board's direction. It concludes (para 2.5) that the appellant fell within the "borderline" range for cognitive ability and would require additional support with both cognitive and adaptive functioning. He was assessed using the WAIS-IV, an assessment of general cognitive abilities. His verbal comprehension score was "borderline" and in the 3rd percentile which meant that he might experience difficulty keeping up with peers in situations which required verbal skills (para 5.1.7). His perceptual reasoning score was in the "borderline" range and in the 4th percentile, so again he might experience difficulty keeping up with peers (para 5.1.9). His working memory was in the "borderline" range and in the 4th percentile so that he might be susceptible to more frequent errors (para 5.1.11). His processing speed score was in the "borderline" range and in the 8th percentile, so that comprehending new information might be more time consuming for him (para 5.1.13). Overall, the appellant's full-scale IQ was assessed to be in the lower end of the "borderline" range as his performance placed him in the 2nd percentile, so that his overall ability was only higher than 2% of adults of a similar age (para 5.1.15).

21. The psychological report indicated that it might be beneficial for professionals working with the appellant to be aware of his overall level of ability, and recommended various strategies including avoiding using overly complicated language, allowing sufficient time for processing information, avoiding tasks which required him to hold information in his head and checking his understanding of concepts, words and instructions by asking him to repeat back information (para 5.1.18).

22. The report also flagged concerns about the appellant's lower cognitive abilities in conjunction with his adaptive functioning, that he would be unable to cope with living alone, struggling with basic tasks such as cooking and organising bills (para 5.3.10). The report also opined about the difficulties he might face if he were deported due to his difficulties with intellectual and adaptive functioning (para 5.3.19).

23. Whilst it is right therefore that the appellant has not been diagnosed with a specific learning difficulty, the psychological report indicates that he has a range of lower cognitive abilities such that he is in the borderline range for a learning disability. This was not apparent from the summary in the OASys report, but it would have been clearly highly relevant for the judge to know for a number of reasons. Firstly, it would have had an impact on the decision whether or not to adjourn the hearing. Secondly, it would have had an impact on specific adjustments that the judge made or considered making at the hearing for the appellant's vulnerability. If the judge proceeded with the hearing, he would have had to consider the effect of those vulnerabilities on the evidence the appellant gave, specifically about his sexuality, which the judge did not find credible [56].

Thirdly the judge would have considered the evidence of the appellant's specific vulnerabilities in the context of his ability to integrate into life in Pakistan. Fourthly the judge would have considered whether to depart from Judge Bristow's findings that there was no family life between the appellant and his mother and siblings in the context of the appellant's now-known vulnerabilities.

24. As a matter of fact therefore the judge was not right to conclude that there was no real change to the assessment made by Judge Bristow in 2018, or at least whilst the judge might strictly speaking be right if that assessment were confined to mental health only, the overall picture of the appellant's mental state and well-being was not complete without consideration of his cognitive abilities. Of course, there was no reason for the judge to conclude that the appellant would or might have any particular cognitive problems, because the OASys report made no mention of this aspect of the psychiatric report or psychological assessment ordered by the Parole Board.

25. We appreciate Mr Parvar's point that the appellant had been represented and his former representatives had not put forward these reports. Of course by the time of the hearing, those representatives no longer represented the appellant. The appellant had however not put forward those reports himself.

26. We have considered the case of MM (unfairness; E & R) Sudan [2014] UKUT 105. The headnote explains: "A successful appeal is not dependent on the demonstration of some failing on the part of the FtT. Thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the FtT, was not considered, with resulting unfairness (E & R v Secretary of State for the Home Department [2004] EWCA Civ 49)".

27. MM explains that the criterion to be applied on appeal is fairness, not reasonableness and that in the context of asylum and human rights appeals, the first of the Ladd v Marshall principles (i.e. that the evidence could not with reasonable diligence have been obtained for use at the hearing) does not apply with full rigour. Judge Burnett's belief that there was no real change to the assessment made by Judge Bristow in 2018, and that the OASys report referred to the main material points arising from the psychiatric and psychological reports was founded on a mistake of fact. The mistake of fact was material for the reasons set out at paragraph 23 above, most importantly and significantly that it was material for the assessment of the appellant's vulnerability and so relevant to the question of whether there should be an adjournment and relevant to the question of any reasonable adjustments to be made for the appellant at the hearing.

28. Mr Parvar has referred us to Begum in the Supreme Court at [90]. It is right of course that fairness is not one-sided, and consideration should be given not just to the position of the appellant but also to the position of the Secretary of State. However this appeal is not akin to the situation referred to in Begum where an appeal should not be allowed merely because the appellant found herself unable to present her appeal effectively; this is more akin to the case where the Supreme Court suggested that a court might stay or adjourn the proceedings where a party had a temporary problem preventing them presenting their case effectively.

29. Ultimately the question in Nwaigwe is what fairness demands when considering an adjournment and whether there was any deprivation of the affected party's right to a fair hearing. Of course the judge did have regard to the vulnerability of

the appellant when considering whether to adjourn [19] but he was not aware of the full extent of the appellant's vulnerability because through no fault of his he had made a mistake of fact as set out at paragraph 27 above. We consider that if the judge had been aware of the significance of the two reports prepared for the parole board he should and would have adjourned the hearing so that those reports could be obtained (and as they had been prepared for the respondent it should have proved possible to obtain them) and so that the appellant, who appeared to be more vulnerable than the judge appreciated, could have a further opportunity to obtain legal representation or at least an opportunity to explain to his mother and/or sister how helpful it would be if they could attend to assist him (see the judge's comments at [12]).

30. We consider that fairness demanded in the circumstances, despite the length of time the case had taken already, the earlier adjournments and the interests of others waiting for their cases to be heard, that the judge have full awareness of the appellant's vulnerabilities before he decided the appeal. Through no fault of the judge the failure to adjourn was therefore unfair. We note the appellant specifically referred in his grounds of appeal to suffering with cognitive issues as well as what one might describe as obvious mental health problems (see paragraph 6 above).

31. It is also right, as Judge Parkes noted, that the judge when making his substantive findings did not consider the appellant's evidence in the context of his being a vulnerable witness. Had the judge not been under a mistake of fact, he would have been bound to consider the effect the appellant's specific vulnerabilities had on the appellant's evidence, specifically the evidence about his sexual orientation, which he found not to be credible. Clearly it would have been possible for the appellant's cognitive issues to have had an impact on his evidence. In the circumstances, the judge's operating under a mistake of fact meant that his conclusion on credibility, through no fault of his, was procedurally unfair.

32. As we explained at the hearing, the errors mean that the decision must be set aside. Given the extent of the necessary fact-finding, the appeal should be remitted to the First-Tier Tribunal.

Notice of Decision

The judge's decision contains errors of law and is set aside with no findings preserved.

The appeal is remitted to the First-Tier Tribunal at Taylor House to be heard by another judge.

A-R Landes

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 December 2024