



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004283

First-tier Tribunal No: PA/51827/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 25th of January 2024

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

MBH
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr S Ell of Counsel, instructed by Broudie Jackson Canter Solicitors

For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard remotely at Field House on 23 January 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (and/or other person). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. By the decision of the Upper Tribunal (Upper Tribunal Judge Owens) issued on 29.12.23, the appellant, a citizen of Bangladesh, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge

Kelly) dated 5.9.23 dismissing his appeal against the respondent's decision of 8.3.23 to refuse his fresh human rights claim made on 3.2.21.

2. The appellant's original claim was for international protection, fearing serious harm or death because of his political opinion and activities in support of the Bangladeshi National Party (BNP), alleging to have been kidnapped whilst in Austria. The claim was the subject of a previous Tribunal decision (Judge Wylie) promulgated 5.6.18, who found the claim to have been fabricated and dismissed the appeal. In that earlier appeal, the appellant had asserted serious medical conditions and that he would not have access to treatment on return to Bangladesh.
3. The latest claim appeared to have been made on human rights grounds under article 3 ECHR, centered on assertions as to the appellant's mental ill-health and risk of suicide on return to Bangladesh.
4. In summary, the grounds argue that the First-tier Tribunal erred:
 - a. By conflating the risk of suicide on enforced return with the previous adverse credibility findings when rejecting the risk of suicide at [29] of the decision. It is submitted that the judge erroneously concluding that there could only be a risk of suicide if the appellant's fears were objectively justified.
 - b. By providing inadequate reasoning for rejecting the risk of suicide at [29] and the expert medical evidence of Dr Lindon at [38].
 - c. By failing to take account of the appellant's vulnerabilities when assessing credibility and making an adverse finding at [31] in respect of his contact with his mother.
 - d. By providing inadequate reasoning when finding there would be adequate treatment available to the appellant on return to Bangladesh.
 - e. By failing to consider all relevant factors, such as that the appellant has been found to be a victim of trafficking, when undertaking the article 8 ECHR proportionality balancing exercise.
5. In granting permission on all grounds, Judge Owens considered it "arguable that the judge failed to evaluate to what extent the appellant's mental health would deteriorate on his return to Bangladesh notwithstanding that his subjective fear of serious harm was not well founded. The judge also arguably gave inadequate reasons for rejecting the medical evidence in respect of the appellant's inability to access treatment. It is also arguable that the judge failed to take into account that the appellant is victim of trafficking in the Article 8 ECHR proportionality assessment."
6. The appellant has applied under Rule 15(2A) for permission to adduce further evidence in the form of an amendment to the medical report, relating to whether the appellant remains in contact with his family. However, at this stage the issue is whether there was an error of law in the making of the decision of the First-tier Tribunal based on the evidence as it was before the First-tier Tribunal. In the circumstances, I do not grant permission at this stage to adduce the further evidence. Mr Ell attempted to refer to it but accepted that it was not relevant to the error of law decision.
7. Following the helpful submissions of both legal representatives, I reserved my decision to be provided in writing, which I now do.
8. I start by observing that Judge Kelly noted at [4(ii)] of the decision that Judge Wylie had acknowledged that the appellant had some mental health problems but

that there was no reliable evidence to suggest that he could not receive medical treatment in Bangladesh. At [9] of the decision, Judge Kelly noted the medical evidence relied on. There were several other and detailed references to the medical evidence throughout the decision, including at [29], [34], [35] and [40] of the decision.

9. Understandably confused by the appellant's claimed reliance on forced labour and ill-treatment allegedly taking place after Judge Wylie's decision, Judge Kelly sought clarification from Mr Ell and was told, as reported at [14] of the decision that the appeal was based solely on the risk of a serious and irreversible decline in the appellant's mental health upon return to Bangladesh, pursuing the claim under both articles 3 and 8 ECHR, also relying on very significant obstacles to integration on the same basis as the mental health claim. After taking instructions, Mr Ell confirmed that whilst the appellant maintained his account, he was not pursuing any protection claim based on a fear of being physically harmed on return. It follows that there was no need for any evidence on or resolution of that issue. The First-tier Tribunal had to proceed on the basis that the factual basis of the claim had been rejected and was no longer pursued.
10. I note that at [26] of the decision, Judge Kelly confirmed that all the evidence before the Tribunal had been considered in the round before reaching any findings, whether or not specifically referenced in the decision. At [28] the judge accepted the diagnosis that whatever the cause of trauma may have been, the result is that he suffers from post-traumatic stress disorder (PTSD) and continues to require therapy, the nature of which treatment the judge identified at [34] of the decision.
11. In rejecting the claim that the appellant will commit suicide if returned to Bangladesh, at [29] of the decision the judge noted that he had failed to substantiate any well-founded fear of harm such as would push him towards suicide. In other words, there was nothing factually causative of the claimed risk. As the judge noted, Dr Lindon's report was premised on the appellant's assertion of 'threat to life' trauma in Bangladesh, reinforced by subsequent death threats conveyed through his family. However, other than this assertion, there was no direct evidence of any recent death threats. Judge Kelly could only link these so-called death threats to the factual claim which had been so roundly rejected as a fabrication by Judge Wylie and which was no longer pursued before the Tribunal. As can be seen from [29] of the decision, Judge Kelly was at pains to try and establish any basis for the claimed risk of suicide on return. The judge specifically address the point that location is not relevant to the response to past trauma but stated, "I am incapable of performing the mental gymnastics required to discount its relevance to future fear, and neither do I understand Dr Lindon to be suggesting that I should do so.
12. The grounds complain that the judge should have proceed on the basis that although his fears are not objectively well-founded, the appellant nevertheless had a genuine subjective fear of serious harm or being killed that creates a suicide risk on return.
13. Mr Ell argued that the judge completely ignored the issue of a subjective fear giving risk to a risk of suicide and asserted that at [29] the judge rejected the risk of suicide merely because there was no well-founded basis for the appellant's fear, or failed to provide reasons for that rejection. That is somewhat of an over-simplification of the judge's careful assessment of the basis for any risk of suicide.

14. Before me, Mr Ell relied on MY (Suicide risk after Paposhvili) [2021] UKUT 232, and the 5th and 6th ‘tests’ in J v SSHD [2005] EWCA Civ 629, which had held that in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3. A further question of considerable relevance was whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights. The fifth ‘test’ was amended in Y (Sri Lanka) v SSHD [2009] EWCA Civ 362 to read, “[...] whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return. [15]” MY held that in relation to subjective fear on return the guidance remains valid post-Paposhvili and should now apply to mental health cases generally where fear is unfounded. In summary, as stated in MY at [124], “The appellant must adduce evidence capable of demonstrating that there are substantial grounds for believing that Article 3 will be violated. This can be explained as raising a prima facie case which means a case which in the absence of challenge would establish infringement. It is a demanding threshold. It is for the Appellant to demonstrate that there are substantial grounds for believing that such a risk exists.”
15. Mr Wain agreed that a subjective fear is capable of being sufficient but argued that that the appellant must still establish a link between the enforced removal to Bangladesh and the claimed risk of suicide. However, the medical evidence was based on the original factual claim for reasons for fearing return to Bangladesh. As Judge Kelly pointed out at [29] the appellant was “on notice of the need to explain the reasons for his supposed suicidal intentions on return to Bangladesh, given that the respondent specifically raised this issue in both the Reasons for Refusal Letter (paragraphs 24 to 27) and in her Review of that decision on the 27th July 2023 (see paragraph 8 of the Review...)”
16. Without the factual matrix of any such protection claim, either predating or postdating the appeal before Judge Wylie, there was no basis upon which Judge Kelly could realistically relate those fears to the claimed suicide risk. Furthermore, the absence of this background necessarily affected the weight that could be attached to the medical evidence as it then stood, the conclusions of which relied on the claims, such as that of torture, as explaining the appellant’s mental state. Put another way, the medical evidence did not establish a risk of suicide on enforced return independently of the rejected and not pursued historical factual matrix. As the judge stated at [38], “However, this conclusion is based entirely upon assumed facts that I have found to be either lacking in credibility or to be unsubstantiated by cogent and reliable evidence.” The appellant could have but did not adduce an updated report to address this. That was the difficulty with which Judge Kelly had to grapple as seen from the narrative of the decision, particularly at [29]. Undoubtedly, Judge Kelly was entitled to take this rather complicated scenario into account when assessing the claimed suicide risk, both under article 3 and article 8.
17. The findings were summarised at [37] of the decision. These accepted that the appellant had been the victim of modern slavery and that over the preceding four years he had received extensive support and medical treatment. However, at [37(4)] Judge Kelly concluded that on the available evidence the appellant had failed to reach the high threshold of establish a real risk that he would commit suicide if returned to Bangladesh. In summary, the medical evidence relied on did

not demonstrate such a risk independently of the no longer pursued factual matrix. For the First-tier Tribunal to be able to proceed on the basis suggested in the grounds, there would need to be cogent medical evidence in support of a risk notwithstanding the absence of any real risk of harm on return. The evidence placed before the First-tier Tribunal could not be parsed in such a way.

18. As to availability of treatment, the judge explained at [38] of the decision that Dr Lindon's opinion that return would cause the appellant's mental state to deteriorate further because he would not be able to access mental health service treatment because that would require him to identify himself in public and because of fear of being identified he would not be able to work, develop relationships, or contact family again, was "based entirely upon assumed facts that I have found to be either lacking in credibility or to be unsubstantiated by cogent and reliable evidence." Judge Kelly went on to address the availability of treatment in Bangladesh.
19. In the circumstances, I am not persuaded that there is any material error of law as to the treatment of the medical evidence.
20. I am also not persuaded by the second ground advanced before me in relation to the findings as to contact with family. In arguing that the adverse credibility finding was irrational, Mr Ell accepted that irrationality has a high threshold. Complaint is made about [31] of the decision, where the judge stated that there was no middle ground between the appellant's claim that he had not spoken to his mother for five years (oral evidence) and his witness statement that he has not had "any contact with family members for over 5 years." That was in stark contrast with what was recorded in Dr Lindon's report, that he continues to have occasional contact with his mother. I do not accept Mr Ell's submission that there are "shades of grey" and the judge "failed to consider all of the options." It was not for the judge to speculate how the inconsistent statements might be reconciled. I am satisfied that the adverse finding was entirely open on the evidence and is supported by cogent reasoning.
21. The third point advanced to me rather depended on the success of the first two, namely that in undertaking the article 8 ECHR proportionality balancing exercise, the judge treated article 8 distinct from the other findings and did not take into account the appellant's vulnerability, his mental health issues and that the appellant has been acknowledged as a victim of trafficking. On the contrary, vulnerability was addressed at [24] of the decision. At [7] and [28] the judge referenced the trafficking decision and abuse experienced. However, the judge was handicapped by the appellant's confusing claims and the absence of detail of the claim to have been subjected to forced labour. Nevertheless, at [37] the judge listed those findings as relevant to the legal analysis. I am satisfied that the First-tier Tribunal took into account all relevant matters. Simply because they are not repeated or relisted under the article 8 assessment does not mean that they were not taken into account. In the circumstances, no error of law arises on this ground.
22. For the reasons summarised above, I find no material error of law in the decision of the First-tier Tribunal.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands as made.

I make no order as to costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 January 2024